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No. 09

IN THE

Supreme Court of the United States

ANTHONY CALABRESE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *United States v. Booker*, 543 U.S. 220 (2005), this Court reaffirmed that 18 U.S.C. § 3553(a) requires district courts to fashion sentences that are "sufficient, but not greater than necessary, to comply with the purposes" of sentencing. Then, in *Kimbrough v. United States*, 552 U.S. 85 (2007), this Court made clear that when Congress exercises its power to *bar* district courts from using a particular sentencing rationale, it does so by the use of unequivocal statutory language. Thus, to the extent that a mandatory term of imprisonment reasonably bears on § 3553(a) factors, a district court has discretion to take that mandatory term into account unless there is explicit legislation to the contrary.

This dispute involves 18 U.S.C. § 924(c), which dictates that a person who uses or carries a firearm during a crime of violence or a drug trafficking crime must be sentenced to a mandatory consecutive term of years. The Seventh Circuit held that the district court could not consider the effect of this mandatory term when applying the § 3553(a) factors, despite the lack of any prohibitory language in § 924(c). This holding furthers a three-way circuit split that has led to non-uniform sentencing in the many cases where § 924(c)'s mandatory minimum applies. The first question presented is:

1. Whether, in the absence of explicit statutory language to the contrary, a district judge has discretion to consider the effect of a mandatory minimum when applying the 18 U.S.C. § 3553(a) factors to reach its ultimate sentencing determination.

Consistent with this Court's precedent, both the First and Fifth Circuits have determined that the question of whether a defendant has received a fundamentally fair trial cannot be determined unless each alleged error is reviewed in light of the entire case, a "cumulative-error analysis." The Seventh Circuit in this case took a different approach; it reviewed the evidentiary holdings independently to determine if each holding, on its own, warranted reversal. The second question presented is:

2. Whether a court must consider the cumulative effects of harmless trial errors in conjunction with other prejudicial circumstances when it evaluates the fundamental fairness of a consolidated criminal trial as protected by the Due Process Clause of the United States Constitution.

PARTIES TO THE PROCEEDING

The caption to the case contains the names of all the parties to this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Anthony Calabrese, respectfully petitions for a writ of certiorari in this case to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS AND ORDERS ENTERED BELOW

The Seventh Circuit's published opinion (Pet. App. 1a-30a) is reported at *United States v. Calabrese*, 572 F.3d 362 (2009). The decision of the District Court for the Northern District of Illinois imposing Mr. Calabrese's sentence is unreported. (Pet. App. 30a-42a.)

JURISDICTION

The Seventh Circuit filed its opinion on July 14, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sentencing Reform Act of 1984, 18 U.S.C. § 3553(a). Section 3553(a) provides, in relevant part:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider . . . (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal

> conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

This case also involves the Gun Control Act of 1968, 18 U.S.C. § 924(c)(1). Section 924(c)(1) provides, in relevant part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . . In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years. . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

The Due Process Clause states that "[n]o person shall . . . be deprived of . . . liberty without due process of law." U.S. CONST. amend. V.

STATEMENT

This case involves a three-way circuit split involving an issue of substantial and recurring importance—whether, in the absence of explicit statutory language to the contrary, a district court has discretion to consider the effect of a mandatory minimum when applying the 18 U.S.C. § 3553(a) factors to reach its ultimate sentencing determination.

After *United States v. Booker*, 543 U.S. 220 (2005), and its progeny, the Sentencing Guidelines are treated as merely advisory, and a district court is directed to impose a sentence "sufficient, but not greater than necessary, to comply with the purposes" of the Sentencing Reform Act. 18 U.S.C. § 3553(a). The Act's purposes include reflecting the seriousness of the offense, promoting respect for the law, and providing just punishment, deterrence, and protection to the public. 18 U.S.C. § 3553(a)(2).

As this Court made clear in *Kimbrough v. United States*, 552 U.S. 85, 128 S. Ct. 558, 569-76 (2007), when Congress intends to *bar* district courts from using a particular sentencing rationale, it uses unequivocal terminology to do so. Thus, while Section 924(c) has no such prohibition, other statutes imposing mandatory minimums unambiguously state that the sentencing judge cannot adjust an underlying sentence by taking the mandatory minimum into consideration. *See, e.g.*, 18 U.S.C. § 1028A(b)(2) ("In determining any term of imprisonment to be imposed for the [underlying] felony . . . a court shall not in

any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section."). Under *Booker* and *Kimbrough*, then, a district court is fully within its discretion to take a § 924(c) mandatory minimum into account when analyzing the § 3553(a) factors and establishing an ultimate sentence.

Contrary to *Booker* and *Kimbrough*, the panel here reaffirmed the Seventh Circuit's agreement with those circuits that prohibit district courts from considering a § 924(c) mandatory minimum when fashioning an appropriate sentence under 18 U.S.C. § 3553(a), even though the plain language of § 924(c) does not contain such a bar. (Pet. App. 14a-16a.) *Accord United States v. Roberson*, 474 F.3d 432 (7th Cir. 2007); *United States v. Chavez*, 549 F.3d 119, 124 (2d Cir. 2008); *United States v. Hatcher*, 501 F.3d 931, 932 (8th Cir. 2007); and *United States v. Franklin*, 499 F.3d 578, 583-86 (6th Cir. 2007).

These decisions conflict directly with opinions of the First, Third, Fourth, Tenth, and Eleventh Circuits, which have either explicitly recognized or implicitly endorsed a district court's wide discretion to consider any relevant factor, including a mandatory minimum, to craft a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing. *United States v. Vidal-Reyes*, 562 F.3d 43, 49 (1st Cir. 2009) ("to the extent that a mandatory term of imprisonment reasonably bears on [the § 3553(a)] factors, it remains, absent legislation to the contrary, within the sentencing court's discretion to take it into account"); *United States v. Angelos*, 345 F. Supp. 2d 1227, 1260-61 (D. Utah

2004) (rejecting government's argument that a district court "may not depart downward from the Guidelines simply because of the penalties imposed by the § 924(c) counts"), *aff'd*, 433 F.3d 738 (10th Cir. 2006); (*United States v. Ezell*, 417 F. Supp. 2d 667, 678 (E.D. Pa. 2006) (imposing a consecutive term of imprisonment of one day on six underlying robbery counts where § 924(c) required a 132-year term of imprisonment for six § 924(c) counts of conviction), *aff'd*, 265 F. App'x 70 (3d Cir. 2008); *United States v. Ciszkowski*, 430 F. Supp. 2d 1283, 1285-89 (M.D. Fla. 2006) (following *Angelos* and *Ezell* in holding that § 924(c) mandatory minimum may be considered in determining a guidelines sentence for other counts of conviction and in determining a reasonable sentence under § 3553(a)), *aff'd*, 492 F.3d 1264 (11th Cir. 2007); *United States v. Barton*, 442 F. Supp. 2d 301, 303-04 (W.D. Va. 2006) (following *Ciszkowski* and *Angelos*), *aff'd*, 216 F. App'x 355 (4th Cir. 2007).

Though relying on the Sixth Circuit's decision in *Franklin*, the Seventh Circuit's decision also conflicts with a more recent Sixth Circuit opinion, *United States v. Guthrie*, 557 F.3d 243, 253-56 (6th Cir. 2009). In *Gutherie*, the Sixth Circuit distinguished *Franklin* and applied a *third* distinct approach: that a sentencing judge may consider the impact of a mandatory minimum on a defendant's sentence so long as the judge does not say explicitly that it is trying to "negate" the mandatory minimum.

In addition to the three-way circuit split, the Seventh Circuit's opinion is at odds with this Court's decision in *Kimbrough*. In *Kimbrough*, this Court reaffirmed that a district judge has wide latitude to make individualized sentencing determinations to assure that sentences are not greater than necessary

to achieve § 3553(a)'s purposes, *Kimbrough*, 128 S. Ct. at 575, and that if Congress intends to circumscribe that latitude, it does so with explicit statutory language, *id.* at 569-76. Under the Seventh Circuit's approach, however, district judges are limited in their analysis of § 3553(a) factors and strictly prohibited from considering a mandatory minimum, despite the absence of prohibitory language in the statute.

The importance of this recurring question, the uncertainty caused by the three-way split of authority, and the wide disparity in sentencing outcomes among the various circuits' resolution of the question presented all counsel strongly in favor of this Court's grant of this petition.

In addition to the critical sentencing issue, this case also involves a constitutional issue of substantial and recurring importance—whether courts must consider the cumulative effects of harmless trial errors in conjunction with other prejudicial circumstances when they evaluate the fundamental fairness of a consolidated criminal trial as protected by the Due Process Clause of the United States Constitution. U.S. CONST. amend. V.

The Seventh Circuit's opinion illustrates precisely why courts must weigh the cumulative prejudicial effect of individual otherwise-harmless trial errors in relation to other prejudicial circumstances which are not technically errors on their own. For example, the Seventh Circuit (1) stated that a reasonable judge could have used a transcript or at least eliminated some of the vulgarities rather than allowing the Government to play for the jury a prejudicial audiotape of Mr. Calabrese and a Government informant (Pet. App. 12a-13a); (2) conceded that the

Government's multiple plea-deal witnesses "had their share of credibility issues" (Pet. App. 6a); and (3) concluded that a prophylactic jury instruction was sufficient to prevent unwarranted "spill-over" among the three separate crimes that the Government prosecuted against Mr. Calabrese simultaneously (Pet. App. 11a-12a). But rather than address the cumulative effect of these issues on Mr. Calabrese's right to a fair trial, the Seventh Circuit compartmentalized them. The broad application of this principle and the different approaches among the circuits likewise counsels in favor of this Court's grant of the petition.

I. Facts Relevant to Petition

In 2001, three armed robberies took place in the greater Chicago area. Almost five years after these three unrelated robberies, the Government indicted Appellant Anthony Calabrese, accusing him of participating in the robberies and using a gun.

Except for the accusation that Mr. Calabrese was involved in all three of the robberies, the Government presented almost no evidence that the three crimes had anything in common. By trying all of the crimes at once, the Government's case benefited from the ability to paint Mr. Calabrese as someone who associated with a long list of felons, all willing to tell various stories about him in exchange for very favorable pleas, or no charge at all. Had any one of the robberies been severed into its own trial, the jury for any one robbery would not have heard from many of these witnesses, since almost all were unrelated. Cumulatively, however, the Government benefitted from three rulings that were prejudicial to Mr. Calabrese—the improper spill-over effect of the

consolidated trials, the playing of a highly prejudicial audiotape, and the parade of felons testifying in exchange for extremely generous plea deals.

II. Proceedings Below

Mr. Calabrese was convicted in 2008 of three counts of robbery under 18 U.S.C. §§ 1951 and 1952, and on three counts of possessing, or causing to be possessed, a firearm in furtherance of a crime, under 18 U.S.C. § 924(c)(1)(A)(ii) and (2). At the sentencing hearing, the district judge stated that she sentenced Mr. Calabrese to a term above the statutory minimum of 57 years on the firearm counts—to an additional 16 years and 9 months for the robbery counts—because she felt compelled to do so, citing the Seventh Circuit's rule that a judge may not consider a mandatory minimum when formulating the underlying sentence. Significantly, the judge stated that she would have imposed a lesser sentence if she were able to consider the impact of the § 924(c) mandatory minimum:

> In sentencing you, the Court looks to the factors in Section 3553, as I am directed to. This case is somewhat unique because I must sentence you, by law, to at least 57 years because of the statutory mandatory minimum on the gun charges. I do not have any discretion over that. That is something that I must tag on to run consecutive to any sentence that the Court imposes.
>
> In sentencing you, Mr. Calabrese, I also read *Roberson*, the Seventh Circuit case, that I must consider the robberies at issue here independent of the 924(c) add-ons.

> And I will be, for the record, Mr. Hunter, the first to tell you for purposes of appeal that if I am wrong in that reading, then this case should come back for resentencing because *I would do it differently if I am wrong in that reading.*
>
> * * *
>
> *I do believe that the Guideline range is too high. And I cannot help but be influenced somewhat by the 57 years that are added on to the sentence, for the reasons I've just articulated.*
>
> *But, nonetheless, I am bound by the Seventh Circuit* [in *Roberson*], *and I must sentence you on the underlying crimes independently.*

(Pet. App. 45a-46a, 47a (emphasis added).)

Mr. Calabrese appealed, and the Seventh Circuit rejected his request to abrogate *Roberson*. (Pet. App. 14a-16a.) The panel insisted that shaving even "a single month off of the sentence for the underlying offense would thwart Congress' will" (Pet. App. 14a-15a), even though Congress in enacting § 924(c) never barred district judges from considering the mandatory minimum when analyzing the §3553(a) factors. The panel did not address the decisions of the Third, Fourth, or Sixth Circuits, though the panel did acknowledge that its decision could

"possibly" be different than those of the First, Tenth, and Eleventh Circuits.[1]

What the panel failed to recognize is that § 3553(a) *requires* a district court to give at least some consideration to the total time a defendant will spend in prison. Allowing a district court to consider a mandatory minimum does not negate the minimum, but rather recognizes the reality that a district court cannot determine an appropriate sentence for a defendant convicted on multiple counts simply by adding together what would be an appropriate sentence for each count. If Congress does not want that result, it can prohibit a judge from taking a mandatory minimum into account when analyzing § 3553(a). As noted above, Congress has done just that in other contexts. *See, e.g.*, 18 U.S.C. § 1028A(b)(2) ("a court shall not in any way reduce the term . . . so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section"). But Congress has chosen *not* to articulate an explicit prohibition in § 924(c).

The panel erred in a second way by addressing each error and questionable trial ruling individually rather than cumulatively. First, the panel addressed the district court's decision not to sever the three trials, and determined that, "if there was some

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[1] The panel tried to distinguish the First Circuit decision, *Vidal-Reyes*, as turning on the fact that the acts resulting in the mandatory minimum were not a predicate act of the underlying offense. But the panel ignored the First Circuit's broad reasoning, which is in direct conflict and irreconcilable with that of the Seventh Circuit.

improper 'spill-over effect,' it was harmless error." (Pet. App. 12a.) Second, the panel decided that even though the district court's decision to "[l]et[] the jury hear the sounds of the beating, as opposed to providing a transcript, might . . . have been over the top," the decision did not constitute an abuse of discretion. (*Id.* at 13a.) Third, the panel found that despite the testimony of the Government's plea deal witnesses, whom the Court determined "had their share of credibility issues," Mr. Calabrese did not meet his burden of showing that their testimony was physically impossible. (*Id.* at 6a, 14a.) After considering each issue individually, the panel affirmed Mr. Calabrese's conviction.

The wording of the panel's opinion illustrates exactly how Mr. Calabrese was unfairly prejudiced by the accumulation of errors and inferences at trial. As the panel admitted, "[a]long the way the jury heard tales of violence that made Calabrese look like Tommy DeVito [a famous mobster played by Joe Pesci in the movie *Goodfellas*] come back to life." (*Id.* at 3a.) The panel also remarked that the cumulative evidence, as presented, "read like a Nicholas Pileggi/ Martin Scorsese screenplay." (*Id.* at 2a.) The panel itself drew such a strong parallel between Mr. Calabrese's "saga" and popular American mobster films that it included two footnotes to illustrate how much Mr. Calabrese's collective story reminded the panel of the popular movie *Goodfellas*. (*Id.* at 3a n.2, 4a n.3.) But the panel did not contemplate the high probability that the jury made the exact same "mobster" inference based on the improper spillover effect, the prejudicial audiotape, and the Government's parade of ten testifying felons. Its opinion did not discuss whether the jurors were unfairly

prejudiced by the spill-over evidence that the Court said accumulated like "scene[s] right out of *Goodfellas*." (*Id.* at 4a n.3.) The opinion noted how this accumulation "overwhelmingly portrayed [Mr.] Calabrese as a ruthless crook constantly on the prowl for new scores." (*Id.* at 6a.) But, because the panel decided that Mr. Calabrese could not prove that any one factor was reversible on its own, it affirmed Mr. Calabrese's convictions.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's opinion has furthered a three-way circuit split regarding whether a district court is barred from considering the imposition of a mandatory minimum when fashioning a sentence under 18 U.S.C. § 3553(a).

A. The Seventh Circuit's ruling directly conflicts with the decisions of other circuits.

In reaching its decision in this case, the panel reaffirmed the Seventh Circuit rule articulated in *United States v. Roberson*. In *Roberson*, the defendant pleaded guilty to bank robbery and to brandishing a firearm in a crime of violence. 474 F.3d at 433. The recommended sentence under the Guidelines for the robbery was 46 months. *Id.* Under § 924(c), the statutory minimum for brandishing a firearm in a crime of violence is a sentence of 84 months that must run consecutively with the sentence for the underlying offense. *Id.* The *Roberson* judge determined that the resulting 130-month sentence would be "contrary to the purposes of sentencing under § 3553," and he reduced the underlying sentence to

assure that the overall sentence was reasonable. *Id.* at 444. The Seventh Circuit reversed, holding that "to use the presence of a section 924(c)(1) add-on to reduce the defendant's sentence for the underlying crime would be inconsistent with Congress's determination to fix a minimum sentence for using a firearm in a crime of violence." *Id.* at 436.

In its decision, the *Roberson* court acknowledged the tension between § 924(c) and § 3553(a). Under § 3553(a), courts are required to impose a sentence "sufficient, but not greater than necessary, to comply with the purposes" of sentencing. The United States Sentencing Guidelines published by the U.S. Sentencing Commission are designed to "reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives." *Rita v. United States*, 551 U.S. 338, 350, 127 S. Ct. 2456, 2465 (2007).

Under the *Roberson* standard, a district judge must first determine an appropriate sentence for the underlying crime before tacking on the mandatory consecutive term of years § 924(c) requires. In other words, the judge must ignore a mandatory minimum required by a § 924(c) firearms conviction when sentencing on the underlying crime—even when the required result is an excessively long total sentence.

The Second and Eighth Circuits have followed the Seventh Circuit's lead and likewise bar district judges from considering mandatory minimums when determining whether a sentence is sufficient to meet § 3553(a)'s purposes. *United States v. Chavez*, 549 F.3d 119, 124, 135 (2d Cir. 2008); *United States v. Hatcher*, 501 F.3d 931, 932 (8th Cir. 2007).

1. **Rulings in the First, Third, Fourth, Tenth, and Eleventh Circuits are irreconcilably in conflict with the Seventh Circuit's decisions in *Roberson* and this case.**

In contrast, the First, Third, Tenth, and Eleventh Circuits have all allowed a district judge to take a mandatory minimum into account when determining a total punishment that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing under 18 U.S.C. § 3553(a). *United States v. Vidal-Reyes*, 562 F.3d 43, 49 (1st Cir. 2009); *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), *aff'd*, 433 F.3d 738, 743 (10th Cir. 2006) (affirming the sentence without comment on this issue); *United States v. Ciszkowski*, 492 F.3d 1264, 1271 (11th Cir. 2007) (same); *see also United States v. Ezell*, 417 F. Supp. 2d 667, 678 (E.D. Pa. 2006), *aff'd*, 265 F. App'x 70 (3d Cir. 2008); *United States v. Barton*, 442 F. Supp. 2d 301, 303-04 (W.D. Va. 2006), *aff'd*, 216 F. App'x 355 (4th Cir. 2007).

The substantial § 924(c) sentences in the cases from the Tenth and Eleventh Circuits are similar to the one here. In *Ciszkowski*, the court imposed a 30-year mandatory minimum sentence on a murder-for-hire conviction and ran it concurrently with other lesser sentences. 492 F.3d at 1268. In *Angelos*, the court imposed a 55-year mandatory minimum sentence on § 924(c) gun convictions, plus one day for three drug trafficking convictions, 433 F.3d at 743, where the Guidelines called for 78 to 97 months. 345 F. Supp. 2d at 1260. The district judge in that case said:

> Without the Guidelines, the court is free to make its own determination of what is an appropriate sentence for these thirteen offenses. In making that determination, the court consults the Guidelines as instructive but not binding. If the sentence on these thirteen counts was the only sentence that Mr. Angelos would serve, a sentence of about 78-97 months might well be appropriate. *But the court cannot ignore the reality that Mr. Angelos will also be sentenced to 55 years on the § 924(c) counts, far in excess of what is just punishment for all of his crimes.* In light of this 55-year sentence, and having considered all of the relevant factors listed in the Sentencing Reform Act, the court will impose a sentence of one day in prison for all offenses other than the § 924(c) counts. Lest anyone think that this is a "soft" sentence, in combination with the § 924(c) counts, the result is that Mr. Angelos will not walk outside of prison until after he reaches the age of 70.

Id. (emphasis added).

In *Vidal-Reyes*, 562 F.3d 43, 49 (1st Cir. 2009), the First Circuit held that a sentencing court could consider *all* relevant circumstances, including the applicable mandatory minimum, to assure that a defendant's sentence was "sufficient, but not greater than necessary, to comply with the purposes" of sentencing. *Vidal-Reyes* concerned the mandatory two-year minimum provided for identity theft in 18 U.S.C. § 1028A. At sentencing, the court adopted the presentence report recommendation of 15 months on the three counts and tacked on the consecutive two-year minimum on the fourth count. Just as in the

instant case, the *Vidal-Reyes* judge commented, on the record, that she desired to impose a lower sentence but felt precluded from doing so under § 1028A. *Id.* at 47-48.

On appeal, the First Circuit reversed the district court's sentence and held that a district judge has discretion to consider the effect of a mandatory minimum when fashioning a reasonable sentence. *Id.* at 56.

Vidal-Reyes built upon the First Circuit's decision in *United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008), which held that, after this Court's decision in *Kimbrough*, district courts have wide discretion to fashion sentences "sufficient, but not greater than necessary, to comply with the purposes" of sentencing.

Despite the Seventh Circuit's attempt to write off these other results as merely "possibly different," it is clear that each decision is irreconcilable with the Seventh Circuit's opinion in this matter. While the Seventh Circuit forbids district courts from considering the effect of a mandatory minimum in determining a reasonable sentence, the First, Third, Fourth, Tenth, and Eleventh Circuits take a conflicting view. Each of these circuits recognizes that barring a district judge from considering a relevant sentencing factor does not allow the sentencing judge to fashion a sentence that is sufficient but not greater than necessary to achieve the purposes of § 3553(a).

2. The Seventh Circuit's opinion is also in direct conflict with the Sixth Circuit's decision in *United States v. Guthrie*.

The Seventh Circuit's opinion further conflicts with the Sixth Circuit's decision in *United States v. Guthrie*, which allows a district judge to consider mandatory minimums when fashioning an appropriate sentence, but only if the judge does not state on the record that a lower underlying sentence is being used.

In *Guthrie*, the Sixth Circuit determined that a district court may reduce the sentence for an underlying count to fashion an appropriate total sentence but may *not* reduce an underlying sentence if the only purpose is to negate the mandatory add-on. *Guthrie*, 557 F.3d at 254-56. The defendant was convicted of three counts related to car-jacking, with a minimum Guidelines sentence of 30 years, and one count of discharging a firearm during a crime of violence, with a minimum sentence of 10 years. *Id.* at 247. The district court sentenced the defendant to only 25 years after determining that the aggregate sentence that would result after the mandatory add-on would not be consistent with the sentencing factors listed in § 3553. The Sixth Circuit upheld the sentence and noted that "after explicitly considering the correct Guidelines range in light of the § 3553(a) factors, the district court found the total advisory sentence of 40 years to be too long." *Id.* at 256.

In its decision, the Sixth Circuit distinguished its earlier decision, *United States v. Franklin*, 499 F.3d 578 (6th Cir. 2009), in which the Circuit had struck down a district court's decision to reduce an underlying sentence. The distinction between the two cases

turned on whether the court reduced the underlying sentence because the aggregate sentence is too large, which the Sixth Circuit apparently allows, or the court reduced the underlying sentence in order "to negate the mandatory minimum sentence for use of a firearm during a crime of violence," which the Sixth Circuit apparently does not allow. *Guthrie*, 557 F.3d at 255.

B. The Seventh Circuit's decision is in direct conflict with this Court's decision in *Kimbrough*.

This Court has recognized that a district court judge is uniquely situated to evaluate the reasonableness of a defendant's sentence. Accordingly, a judge is given wide discretion to consider all relevant factors when fashioning a sentence. *Kimbrough*, 128 S. Ct. at 574. Moreover, under *Kimbrough*, when a sentencing statute is silent, district courts are not required to "[draw] meaning from silence . . . for Congress has shown that it knows how to direct sentencing practices in express terms." *Kimbrough*, 128 S. Ct. at 571.

In *Kimbrough*, the Government argued that the Anti-Drug Abuse Act of 1986, 100 Stat. 3207, "implicitly," but not expressly, required courts to apply a specified sentencing formula or it would be "logically incoherent" with the statute. *Id.* at 570. This Court rejected that argument, holding that, with sentencing issues, "[d]rawing meaning from silence is particularly inappropriate . . . for Congress has shown that it knows how to direct sentencing practices in express terms." *Id.* at 571. The same logic applies here. If Congress wanted courts to apply the § 3553 factors only to the underlying sentence, not the

aggregate sentence, it would have made that mandate explicit in the statute. For example, in the identity-theft statute at issue in *Vidal-Reyes*, Congress explicitly directed that the sentencing court "shall not in any way reduce the term to be imposed" for the underlying crime "to compensate for" the additional penalty for identity theft. 18 U.S.C. § 1028A; *see Vidal-Reyes*, 562 F.3d at 49. In contrast, there is nothing in § 924(c)'s plain language that prohibits a court from weighing the § 924(c) mandatory minimum when analyzing the § 3553(a) factors and setting the underlying sentence.

Directing courts to ignore a mandatory minimum when fashioning a sentence will result in unreasonable sentences. In this case, for example, the judge determined that she was compelled to sentence Mr. Calabrese to a total sentence that was greater than necessary, in direct contradiction to § 3553. Given that Mr. Calabrese's co-defendants received dramatically lower sentences, Mr. Calabrese's sentence fails to meet § 3553's requirement for a sentence to appropriately reflect the seriousness of the offense, promote respect for the law, and provide a just punishment.

A district judge's adjustment of an underlying sentence based on a mandatory minimum does not thwart Congressional intent that a "mandatory" minimum not be reduced. That is because the adjustment is to the underlying sentence, not the mandatory minimum. And if Congress does not want the district judge to have the power to adjust the underlying sentence based on the mandatory minimum, it need only say so, as it did in 18 U.S.C. § 1028A(b)(2) ("a court shall not in any way reduce the term . . . so as to compensate for, or otherwise take into account,

any separate term of imprisonment imposed or to be imposed for a violation of this section"). The Second, Seventh, and Eighth Circuits' approach treats § 1028A's explicit language as mere surplusage. In contrast, the approach taken by the First, Third, Fourth, Tenth, and Eleventh Circuits vindicates Congressional intent because it gives meaning to all the words in § 924(c) and § 1028A(b)(2) as well as to the discretion Congress vested in district judges through § 3553(a).

C. This case is ideally situated for review as the district judge stated that she would sentence Mr. Calabrese to a shorter sentence if not bound by *Roberson*.

The issue presented in this petition requires immediate review, not only to provide guidance to sentencing courts, but also to assure that future defendants are not deprived of their right to a reasonable sentence. Mr. Calabrese's case is uniquely situated for such review, because the district judge has already stated on the record that she would sentence Mr. Calabrese to a lesser underlying sentence if she was not shackled by the Seventh Circuit's decision in *Roberson*.

Moreover, the facts of this case demonstrate why the *Roberson* rule should be revisited: the sentence in this case does not promote respect for the law, nor just punishment, as 18 U.S.C. § 3553(a) requires, particularly when Mr. Calabrese's sentence is compared to other defendants who received very lenient sentences because of the deals they struck.

D. Resolution of this conflict is necessary to restore uniformity in sentencing.

The question of whether a district judge may consider a mandatory minimum when analyzing § 3553(a)'s factors and setting the underlying sentence is an issue raised in thousands of cases across the United States. Under the current circuit split, defendants face vastly different sentences based solely on the jurisdiction where the charges were brought. This disparity is contrary to this Court's commitment in *Booker* to bring uniformity to sentencing. 552 U.S. at 223.

In Mr. Calabrese's case, he was not lucky enough to live in Utah or Pennsylvania, or even in Michigan. Unfortunately, he was sentenced in Illinois, and his sentence reflects the harsh and unique interpretation of 18 U.S.C. § 924(c) employed by the Seventh Circuit, an interpretation that is flatly at odds with the discretion that Congress gave to district judges in enacting § 3553(a) and with the fact that § 924(c)'s plain text contains no prohibition barring a district judge from considering § 924(c)'s mandatory minimum when conducting a § 3553(a) analysis. This Court should grant the petition and reverse.

II. The Seventh Circuit's opinion separately conflicts with This Court's interpretation of the cumulative error doctrine.

In addition to the three-way split regarding sentencing, this case also involves a constitutional issue of substantial importance—whether a court must consider the cumulative effects of harmless trial errors in conjunction with other prejudicial circumstances when it evaluates whether a defendant

enjoyed a fundamentally free trial as protected by the Due Process Clause of the United States Constitution. U.S. CONST. amend. V.

A. The Seventh Circuit's decision ignored the clear prejudice that arose from the trial court's multiple evidentiary errors.

The Seventh Circuit panel opinion demonstrates exactly why courts must weigh the cumulative prejudicial effect of individual otherwise-harmless trial errors in relation to other prejudicial circumstances that are not technically errors on their own. The opinion completely ignores the severe prejudice that accumulated from each evidentiary decision. The panel acknowledged that Mr. Calabrese's arguments had some merit, yet it still dismissed each argument standing on its own in the name of judicial efficiency.

Both on appeal and during trial, Mr. Calabrese argued that allowing the jury to hear an audiotape of him severely beating and threatening a government informant was unfairly prejudicial under Federal Rule of Evidence 403. Mr. Calabrese reasoned that the unfair prejudice resulting from the graphic depiction of violence and vulgar language outweighed any of the tape's probative value. FED. R. EVID. 403. The panel acknowledged that "a reasonable judge could have decided to use a transcript instead, or even to eliminate some of the vulgarities," but it nonetheless ultimately concluded that the trial court did not abuse its discretion. (Pet. App. 13a.) Officially, the panel held that the audiotape was relevant to "suggest[] consciousness of guilt." (*Id.* at 12a.) But the panel admitted that the tape's real purpose could

have been to illustrate to the jury, "just how violent [Mr. Calabrese] was." (*Id.* at 13a.)

Mr. Calabrese also argued that the district court erred in admitting the testimony of ten felonious witnesses, each of whom testified after reaching a deal with federal prosecutors. (Pet. App. 13a-14a.) The panel was forced to acknowledge that the Government's plea-deal witnesses "had their share of credibility issues." (*Id.* at 6a.) But the panel held that because Mr. Calabrese did not prove their testimony "physically impossible," the panel would not consider the prejudicial effects of that testimony as it affected all three trials. (*Id.* at 14a.)

Finally, when the panel reviewed the trial court's severance motion for abuse of discretion, it only considered the prejudicial effects of the "other crimes and bad acts" that improperly "spill[ed]-over" from trial to trial under Federal Rule of Evidence 404(b). (Pet. App. 11a-12a.) It held that this "'spill-over effect' was harmless error," because "there is nothing to indicate the jury ignored [the trial court's] command" to consider each count and the evidence relating to it separately. (*Id.* at 12a.) But the Court did not address how this spill-over effect amplified the prejudicial effects of the audiotape and the piling on of less-than-credible witnesses testifying against Mr. Calabrese.

B. The Seventh Circuit's opinion directly conflicts with this Court's due-process decisions.

In *Kotteakos v. United States*, 328 U.S. 750 (1946), this Court addressed the delicate balance that it seeks to maintain between judicial efficiency and the individual protections afforded to American

citizens in criminal trials. Under the harmless error doctrine, "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." FED. R. CRIM. P. 52(a). Giving guidance to this principle, the *Kotteakos* Court said, "if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Kotteakos*, 328 U.S. at 765. "[I]t is the essence of the harmless error doctrine that a judgment may stand only when there is no 'reasonable possibility that the [practice] complained of might have contributed to the conviction.'" *United States v. Hasting*, 461 U.S. 499, 506 (1983) (*quoting Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)).

Justice and fundamental fairness require that harmless-error analysis not take place in a vacuum. A single otherwise "harmless error" can quickly become reversible error depending on the circumstances of the case.

C. The Seventh Circuit's opinion directly conflicts with the First and Fifth Circuits' adoption of the "cumulative-error analysis."

Following this Court's directives in *Kotteakos*, the Tenth Circuit Court of Appeals has determined that the effect of multiple errors must be considered together and noted:

> [a] cumulative-error analysis . . . *aggregates all the errors* that individually have been found to be harmless, and

> therefore not reversible, and its analyses *whether their cumulative effect* on the outcome of the trial is such that collectively they can no longer be determined to be harmless . . . . The harmlessness of cumulative error is determined by conducting the same inquiry as for individual error—courts look to see whether the defendant's substantial rights were affected.

United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990) (emphasis added).

The Fifth Circuit has followed suit and recognized the potential constitutional harm when error and other circumstances combine to amplify the effects of unfair prejudice. *See United States v. Diharce-Estrada*, 526 F.2d 637, 640-42 (5th Cir. 1976). In *Diharce-Estrada,* the court recognized that sometimes "harmful effects of the atmosphere" are capable of prejudicing a defendant, and held that, "[b]ased upon the combination of errors and prejudicial circumstances," the defendant did not receive a fair trial. *Id.*

In *Taylor v. Kentucky*, 436 U.S. 478, 488 n.15, this Court stated that the cumulative effect of otherwise-harmless trial errors can combine with other prejudicial non-errors and "extraneous, negative circumstance[s]" to collectively deprive a criminal defendant of a fundamentally fair trial. *Id.*

The panel's holding in this case flies in the face of the decisions rendered by the First and Fifth Circuits and this Court. One by one, the panel

examined the "spill-over effect," the "over the top" decision to play the audiotape for the jury, and the ten felonious witnesses whose shaky testimony accumulated to paint Mr. Calabrese as a bad man. (Pet. App. 12a-13.) If the district judge considered these issues cumulatively, the result might have been very different.

D. Resolution of this circuit split is necessary to protect defendants' due process rights to a fair trial.

The panel's characterization of Mr. Calabrese as a "mobster" right out of a Martin Scorsese film illustrates why courts must consider the cumulative effect of erroneous evidentiary rulings and prejudicial "closer call[s]." (Pet. App. 13a.) In situations such as this, when the threat of unfair prejudice is so blatant, "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

Therefore, this Court should grant the petition to decide whether a district court must consider the cumulative effects of harmless trial errors in conjunction with other prejudicial circumstances when it evaluates the fundamental fairness of a consolidated criminal trial as protected by the Due Process Clause of the United States Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 12, 2009

In the
United States Court of Appeals
For the Seventh Circuit

No. 08-2861

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY CALABRESE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 06 CR 239 – **Amy J. St. Eve.**, *Judge.*

ARGUED MAY 28, 2009 – DECIDED JULY 14, 2009

Before EVANS, WILLIAMS, and TINDER, *Circuit Judges.*

EVANS, *Circuit Judge.* A jury convicted Anthony Calabrese of three counts of robbery and three counts of using a firearm in connection with those crimes. On appeal, he asks us to reverse his convictions on several grounds: that the court should have conducted separate trials for each of the robberies; that the judge should have excluded an audiotape that recorded what was said during a beating

administered to a potential witness; and that the evidence was otherwise insufficient to support the convictions. Failing that, Calabrese seeks resentencing because he says the one he received, though consistent with our decision in *United States v. Roberson*, 474 F.3d 432 (7th Cir. 2007), is excessive. We review the facts in the light most favorable to the verdict. And so viewed, the facts read like a Nicholas Pileggi/Martin Scorsese screenplay.

The evidence established that a group of Chicago-area thugs knocked off three local businesses in a crime spree that stretched from April to September 2001. The robberies were orchestrated by Calabrese from the back office of his auto shop (Tony C's First Impressions), and everything generally went according to plan. Afterwards, however, police nabbed one of the crew members and persuaded him to cooperate. The main target was Calabrese. Besides his role in the robberies, Calabrese was supposedly linked to organized crime. He was also the suspected triggerman in a pair of unsolved mob hits.[1] Outfitting the cooperating witness with a wire – and turning other crew members in the meantime – the police eventually gained enough evidence to charge Calabrese with the robberies. Whether the police planned all along to use those charges as leverage in the murder case or not –

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[1] Steven Warmbir, *The Tony Calabrese Trial So Far*, Chicago Sun-Times Blog (Feb. 7, 2008) *at* http://blogs.suntimes.com/mob/2008/02/the_tony_calabrese_trial_so_fa.html (last visited June 1, 2009).

those deaths remain unsolved – Calabrese went to trial on the lesser charges and ended up with an effective life sentence. Along the way the jury heard tales of violence that made Calabrese look like Tommy DeVito[2] come back to life.

The first job was to knock off a store called the Leather Connection. Apart from Calabrese, the crew consisted of Robert Cooper, Sean Smith, Walter Polino, and Marcus Baker. After meeting up at the auto shop, the gang took off in two vehicles – Polino's car and a cargo van rented by Calabrese – and headed for the store. Calabrese gave Cooper a roll of duct tape and a gun; they were locked and loaded. But then, following a cell-phone conversation in which he obtained more information about the target, Calabrese had second thoughts. He directed the crew to stop at a Chinese restaurant so they could discuss the plan over lunch. Feeling better on a full stomach, Calabrese decided they should go for it.

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[2] Tommy DeVito is the violent sociopath played by Joe Pesci (who won the Academy Award for Best Supporting Actor) in the 1990 movie classic *Goodfellas*. The movie, directed by Martin Scorsese and based on a nonfiction book (*Wiseguy*) by Nicholas Pileggi, recalls, among other things, the travails of mobster "Two-Gun Tommy" DeSimone, the best buddy of the real-life lead character in the movie (Henry Hill) played by Ray Liotta. As the movie opens, Hill harkens back to how it all began, explaining that, at the age of twelve, his ambition was to become a gangster: "To me," he explains, "being a gangster was better than being the president of the United States."

Cooper strolled into the store with Smith and, flashing his pistol, forced the owner, Cary Feldman, and Feldman's mother, Molly Nudell, into a storeroom. Calabrese followed and watched as Cooper bound them with duct tape. Then the threesome got to work loading leather coats into the van – together with roughly $10,000 discovered along the way – while Polino and Baker remained in the car as lookouts. Afterwards the crew split up – Calabrese went back to First Impressions, and the rest of the gang hit up a local bar for a few drinks until Calabrese called them back to divvy up the booty. Calabrese kept the lion's share.

The next target was the Metamorphous Tattoo Parlor. It wasn't a robbery so much as a beat-down. The "artist," who was co-owner of the shop, supposedly tattooed a mob boss's underage daughter, and the father was none too pleased. Instead of working this one personally, however, Calabrese asked associate Ed Frank to find some guys to shut the place down for good. Frank in turn reached out to his drug dealer, Martin Flores, who said he was game. When the three met up at First Impressions to cover the details of the job, Calabrese stressed three things: Flores needed to break the artist's hands; he needed to steal the tattoo machines; and he needed to take ID cards from any witnesses to deter them from contacting the police.[3] Flores agreed. After recruiting

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[3] Another scene right out of *Goodfellas*, when Robert DeNiro's character (Jimmy "the Gent" Conway) confiscates the

(Continued on following page)

his cousin and another buddy – and picking up plastic zip ties and a gun supplied by Calabrese – Flores and his pals proceeded to the job.

Flores and the other hoods came through the door in classic stick-up fashion. Flores waved his pistol and ordered everyone to the floor, and his sidekicks restrained the bunch with zip ties. Although that was the extent of the terror for three of the four victims, Mike Farell (the "artist") was in for special treatment. Following through on Calabrese's orders, the crew pulled Farell into the back and beat him severely, pounding his hands with a hammer. They then told Farell to "get out of Lockport," rounded up the expensive tattoo equipment and everyone's ID, and fled the scene. Once again, the rendevous point was First Impressions. At Calabrese's direction, Frank paid Flores and his buddies for their work. Calabrese took the stolen machines and ID cards, and they called it a day.

The final job was a plain old cash grab, though it turned out to be far less lucrative than Calabrese had hoped. The target this time was Morris' Meat Packing. One of Calabrese's associates, Richard Dawson, had a friend on the inside who said the joint kept large amounts of money on site, perhaps as much as $200,000. That proved to be wishful thinking, as the crew scored only a little over $15,000. Once again,

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drivers license of a trucker whose cargo has just been hijacked, reminding him that "now I know where you live."

Calabrese organized the heist. He tapped Frank as his partner, and when Dawson recruited Dave Sims, the gang was set at four. On the way to the store, Calabrese told Frank and Dawson that the three of them would go inside while Sims waited as the getaway driver. Dawson objected, however, so Sims took his place. When the three entered the store, Calabrese and Sims were packing heat. They headed to the back office where Frank Masellis, one of the shop's owners, was talking with Irma Powell, the mother to one of its retail butchers. Calabrese demanded cash, and Masellis handed him $15,500 from a pair of file cabinets. Before fleeing, Calabrese took Masellis's driver's license and told him that if he didn't keep quiet, his kids would end up dead. When the crew reconvened at First Impressions, Calabrese once more kept the bulk of the loot; he gave $1,000 each to Dawson and Sims, and $1,300 to Frank.

The jury heard all about this saga through a collection of victims and accomplices turned state's evidence. Though the accomplices had their share of credibility issues – and the victims' memories seemed cloudy at times – the testimony overwhelmingly portrayed Calabrese as a ruthless crook constantly on the prowl for new scores. And if there were any doubt about just how violent he was, a recorded conversation made it clear as day.

A few months after the crime spree, Frank showed up unexpectedly at First Impressions. Calabrese was there, as was Cooper, but they were suspicious. For whatever reason – perhaps because Frank was

recently in custody on an unrelated charge – Calabrese and Cooper were concerned that Frank was cooperating with authorities, maybe even wearing a wire. Their instincts were right, of course, but despite searching Frank they never found the bug. Instead, the wire captured the whole conversation, including references to crime, death threats to Frank, and a few knocks so he wouldn't forget. Here's a sample of what the jury heard:

CALABRESE: I mean any little stupid shit you know that goes on around here, you know to keep your mouth shut. I mean you understand what'll happen?

FRANK: Tony, do I look like I wanna be dead?

COOPER: No one said . . .

CALABRESE: Nobody said you're gonna be dead.

FRANK: I, I know the seriousness of what goes on here. I ain't stupid.

CALABRESE: There ain't no seriousness. I mean, you know when people get in trouble sometimes they fuckin' make shit up. We don't want you to fuckin' be making anything up, that's all. I fuckin' bust my balls here all day long, I

got enough fuckin' shit going on here. I don't need no, don't need nobody else to fuckin' start rumors or fuckin' shit, so.

. . . .

COOPER: Where you living at?

FRANK: In a hotel.

COOPER: Which hotel?

FRANK: Eh, why is that all that necessary?

COOPER: Because I asked for it, that's why.

CALABRESE: Yeah, why?

FRANK: Tony, I don't really feel safe to say.

COOPER: Why not?

CALABRESE: Fuck you, motherfucker, fuck you, what did you say? Fuck you.

(Fighting in the background)

FRANK: I'm sorry, I'm sorry, I'm sorry, I'm sorry, I'm sorry.

CALABRESE: Fuck you.

FRANK: I'm sorry, I'm sorry, I'm sorry.

CALABRESE:	Cocksucker. Fuckin' did everything for you, you're gonna act like that to me.
FRANK:	I'm sorry, Tony.
CALABRESE:	Fuck you.
COOPER:	Punk ass bitch. Get your ass back up. You wanna feel safe? I'll give you something safe. Remember the last time, I told you? Do you?
FRANK:	Yes, sir.
	. . . .
CALABRESE:	Let me tell you something. Anything fuckin' happens, anything happens to me, anything around here, we'll fuckin' kill you.

The judge excluded the worst parts of the tape – death threats to Frank's family – but, as one can see, the balance was pretty awful.[4]

With all this evidence, finding Calabrese guilty as charged was an easy task. Sentencing was more difficult. Though the judge viewed the crimes as "very violent," she was troubled by the statutory minimums on the three gun counts. Under 18 U.S.C.

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[4] The judge also excluded, throughout the trial, any references to organized crime.

§ 924(c)(1)(A)(ii), she was required to impose at least a seven-year sentence for the first gun conviction and, under § 924(c)(1)(C)(i), consecutive sentences of at least 25 years for each of the other two convictions. So that made 57 years at a minimum, and it had to run consecutively to whatever sentence the judge imposed for the robbery counts. Had she the liberty to do so, the judge said she would have considered the 57-year minimum when crafting the robbery sentence. But the judge felt compelled by our decision in *Roberson* to view the robberies independently. Accordingly, she sentenced Calabrese to 67 months – still below the guidelines range – for the robbery convictions. All said and done, Calabrese, 42 at the time, caught a sentence just over 62 years (67 months, plus 7, 25, and 25 years, all consecutive).

Calabrese's first argument is that the court should have conducted a separate trial for each robbery. The general rule, of course, is that multiple counts can be charged in a single indictment "if the offenses charged . . . are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." Fed. R. Crim. P. 8(a). Calabrese does not argue that this standard was not met; he concedes that all counts were properly brought together in the indictment. Nevertheless, he says the court erred in denying his motion for severance under Rule 14. That Rule authorizes a court to order separate trials of counts if a single trial "appears to prejudice a defendant or the government. . . ." Fed. R. Crim.

P. 14(a). When the initial joinder is not at issue, we review denial of a severance motion for abuse of discretion. *United States v. Quilling,* 261 F.3d 707, 714 (7th Cir. 2001). Apart from the hurdle of deferential review, the Rule 14 standard is exacting: "The defendant must be able to show that the denial of severance 'caused him actual prejudice in that it prevented him from receiving a fair trial; it is not enough that separate trials may have provided him a better opportunity for an acquittal.'" *Id.* at 715 (quoting *United States v. Alexander,* 135 F.3d 470, 477 (7th Cir. 1998)). "Because Rule 14 assigns to the district court the task of balancing the cost of multiple trials against the possible prejudice inherent in a single trial, a defendant bears 'an extremely difficult burden' of showing that the district court abused its discretion." *United States v. Rollins,* 301 F.3d 511, 518 (7th Cir. 2002) (quoting *United States v. Moore,* 115 F.3d 1348, 1362 (7th Cir. 1997)).

Measured against this standard, we must reject Calabrese's argument. He claims that he was prejudiced because the evidence was shaky as to his involvement in each individual robbery, but when the jury heard about his role in the overall scheme it likely borrowed evidence from the other robberies to reinforce a finding of guilt. Certainly, evidence of other crimes or bad acts can have a tendency to influence a jury's analysis, which is why Federal Rule of Evidence 404(b) prohibits this evidence to prove a criminal character. But the judge instructed the jury that "[e]ach count and the evidence relating to it

should be considered separately," and there is nothing to indicate the jury ignored this command. Moreover, the premise of Calabrese's argument is flawed – the evidence was *not* shaky as to each individual robbery; it was overwhelming. So even if there was some improper "spill-over effect," it was harmless error. Calabrese has failed to establish that holding a single trial caused him actual prejudice. On top of that, if separate jury trials were conducted, a good bit of evidence about the other robberies would have no doubt been properly received by the jury as Rule 404(b) evidence to show things like intent, preparation, motive, and absence of mistake.

Similarly, Calabrese fails to show reversible error in the admission of the audiotape. We review this claim for an abuse of discretion, as the district court has broad latitude to control the admission of evidence. *United States v. Ozuna,* 561 F.3d 728, 738 (7th Cir. 2009). We will reverse only where "no reasonable person could take the view adopted by the trial court." *Id.* Here, the trial court determined both that the conversation on the audiotape was relevant and that, with the worst parts excised, its probative value was not substantially outweighed by the danger of unfair prejudice. *See* Fed. R. Evid. 403. A reasonable person could take that view. Relevance cannot be genuinely disputed; we have repeatedly observed that intimidation of a witness suggests consciousness of guilt, *United States v. Miller,* 276 F.3d 370, 373 (7th Cir. 2002); *United States v. Balzano,* 916 F.2d 1273, 1281 (7th Cir. 1990), and the inference holds true in

this case. There's just not much to the argument that the conversation lacked relevance because it didn't explicitly refer to one of the crimes at issue. As a practical matter, specifics were unlikely to come up because Calabrese was worried about a wire. And the possibility that they were talking about another crime only made the conversation incrementally less relevant, not irrelevant altogether. On the other hand, whether the risk of unfair prejudice outweighed that relevance is a closer call. Letting the jury *hear* the sounds of the beating, as opposed to providing a transcript, might, in some minds, seem over the top. But the judge might have reasonably thought that the tape worked better overall. Voices can reveal meaning that words alone might mask (e.g., insincerity when Calabrese insisted, "There ain't no seriousness."), and the beating showed just how concerned Calabrese really was. True, a reasonable judge could have decided to use a transcript instead, or even to eliminate some of the vulgarities, but that's just the point – reasonable minds can differ. There was no abuse of discretion.

Turning to Calabrese's final argument against the convictions – insufficiency of the evidence – we find that we have already answered it. Viewing the evidence in the light most favorable to the verdict, the facts at trial placed Calabrese at the center of every robbery. Indeed, Calabrese does not contend that the testimony, if believed, would be inadequate. His only claim is that many of the witnesses lacked credibility. That's a pretty desperate argument because we do

not second-guess jury credibility determinations. *See United States v. Brandt,* 546 F.3d 912, 917 (7th Cir. 2008). Granted, there can come a point where testimony is so implausible that it cannot be trusted as a matter of law. But that category of testimony is exceedingly narrow: "For a witness's testimony to be held incredible as a matter of law, 'it must have been either physically impossible for the witness to observe that which he or she claims occurred, or impossible under the laws of nature for the occurrence to have taken place at all.'" *United States v. McEntire,* 153 F.3d 424, 435 (7th Cir. 1998) (quoting *United States v. Dunigan,* 884 F.2d 1010, 1013 (7th Cir. 1989)). Yet, Calabrese doesn't argue these sorts of things. He simply points to relatively minor inconsistencies (like whether the crew wore masks during the Leather Connection robbery) and motive to lie. Neither inconsistencies nor motive to fabricate are capable of rendering testimony legally incredible. *Id.*; *United States v. Wilson,* 31 F.3d 510, 514 (7th Cir. 1994).

That brings us to sentencing. Calabrese does not argue that the court erred in crafting his sentence under prevailing law. Instead, he asks us to change the law. In *Roberson,* we held that the mandatory add-on sentence flowing from using a gun in a crime of violence may not be used to justify a lower sentence on the underlying offense. *Roberson,* 474 F.3d at 436. To take such an approach, we explained, would be to contradict "Congress's determination to fix a minimum sentence for using a firearm in a crime of violence." *Id.* Even shaving off a single month from

the sentence on the predicate crime thwarts Congress's will:

> If the judge reduces the defendant's sentence on the underlying crime of violence from, say, 50 to 49 months *because* the defendant used a gun and therefore (if it was brandished) must be sentenced to 84 months on top of the sentence for the underlying crime, the effect is to reduce the statutory minimum sentence from 84 months to 83 months.

Id. Courts don't have that power. We *do* have the power, on the other hand, to overturn a prior decision in the presence of "compelling reasons." *United States v. Shutic*, 274 F.3d 1123, 1126 (7th Cir. 2001). But Calabrese doesn't offer any. The fact that the law may *possibly* be different in other circuits, *see United States v. Vidal-Reyes*, 562 F.3d 43, 56 (1st Cir. 2009) (holding that district court had authority to consider statutory minimum for identity theft, 18 U.S.C. § 1028A, when imposing sentence for *non-predicate* crimes charged in the same indictment); *United States v. Ciszkowski*, 492 F.3d 1264, 1268 n.3 (11th Cir. 2007) (observing, but not passing judgment on, decision to impose a lower sentence due to § 924(c)); *United States v. Angelos*, 345 F. Supp. 2d 1227, 1260 (D. Utah 2004) (imposing sentence of one day on other counts in light of § 924(c) add-ons), *aff'd*, 433 F.3d 738 (10th Cir. 2006) (affirming without comment on this issue), does not by itself constitute a "compelling reason" to disrupt our precedent. We are satisfied that the rule we adopted is the only choice consistent

with separation-of-powers principles, and we are comforted by the fact that the appellate courts that *have* ruled on this issue tend to agree, *United States v. Chavez*, 549 F.3d 119, 133-35 (2d Cir. 2008); *United States v. Hatcher*, 501 F.3d 931, 933 (8th Cir. 2007); *United States v. Franklin*, 499 F.3d 578, 583-86 (6th Cir. 2007).

Under *Roberson*, we simply ask whether Calabrese's sentence for the underlying crimes was reasonable, putting to the side any concerns arising from the § 924(c) add-ons. 474 F.3d at 437. It's somewhat unfortunate that we have to analyze the sentence for the robberies in a vacuum, but that is what Congress has effectively asked us to do. Considering the violent nature of the robberies and Calabrese's pivotal role, the trial court's *below-guidelines* concurrent sentences of 67 months on each of the three robbery counts is not unreasonable.

The convictions and sentence are AFFIRMED.

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Amy J. St. Eve	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	06 CR 239	DATE	1/9/2008
CASE TITLE	USA vs. Anthony Calabrese		

DOCKET ENTRY TEXT

Defendant Calabrese's motion in limine to exclude audiotape [168] is granted in limited part and denied in part.

■ [For further details see text below.]

Notices mailed by Judicial staff.

STATEMENT

Defendant Anthony Calabrese has moved to exclude from evidence at trial an audiotape of a meeting between Defendant, Robert Cooper (who is now cooperating with the government) and cooperating witness Edmond Frank that took place on January 31, 2002. Defendant argues that the tape is irrelevant, and to the extent it has any relevance, that relevance is substantially outweighed by the danger of unfair prejudice. Defendant's motion is granted in limited part and denied in part.

I. The Taped Confrontation

Defendant Calabrese is charged in the Second Superseding Indictment ("Indictment") with three counts of attempting to and committing robbery, in violation of 18 U.S.C. § 1951(b)(1), and three counts of possessing and brandishing a firearm in connection with each of the charged robberies, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). The government will seek to introduce an audio taped confrontation between cooperating witness Edmond Frank, Robert Cooper and Defendant Calabrese. The government has represented that Cooper will testify regarding his involvement with Defendant in the robbery charged in Count One, including testimony that Defendant gave him a .357 firearm to use during that robbery before he, Defendant and another individual entered the store and robbed it at gunpoint. The government further has represented that Frank will testify that he, Cooper and others worked for and with Defendant Calabrese in connection with various criminal activities, including those charged in the Indictment. Frank is further expected to testify regarding his involvement with Defendant in the robbery charged in Count Four of the Indictment, including Defendant's alleged instruction to the men involved in the robbery to collect a photo identification from anyone in the location of the robbery. Defendant, according to Frank, "wanted the victims' identification to locate and intimidate them from ever becoming witnesses." The government also anticipates that

Frank will testify regarding his involvement in the armed robbery charged in Count Six.

On January 31, 2002 – after the dates of the charged conduct in the Indictment – Edmond Frank was cooperating with the government. In connection with his cooperation, he agreed to wear a recording device to record a meeting that afternoon with Robert Cooper – who was not yet cooperating with the government – and Defendant Calabrese. The meeting took place at Calabrese's business. At the beginning of the meeting, Defendant Calabrese told Frank "[T]hree weeks and she didn't know where you were. What about that? First of all, lift your shirt up." Frank is expected to testify that Defendant was attempting to determine if Frank was wearing a wire. Frank proceeded to tell Defendant that he was in jail in Indiana, Lake County in response to his questioning of Frank's whereabouts. Defendant then asked various questions about how Frank was able to get out of jail. Frank is expected to testify that he understood this "grilling" to be an attempt to determine whether Frank was lying about his whereabouts because Defendant was suspicious that Frank might be cooperating with law enforcement. Defendant subsequently informed Frank on the tape that "any little stupid shit you know that goes around here, you know to keep your mouth shut. I mean you understand what'll happen?" When Frank responded that he would be "dead" and that he understood the "seriousness of what goes on here," Defendant Calabrese stated that

there was no "seriousness" and that he is afraid that someone might "make something up" about him. Frank is expected to testify that Defendant was suspicious and trying to respond in a non-incriminating way.

Cooper also questioned Frank about where he stayed during the three week period. When Frank responded "why is that all necessary?" and said he did not feel "safe to say," both Defendant and Cooper begin beating up on Frank who responds "I'm sorry, I'm sorry, I'm sorry." Calabrese answered "Fuckin' did everything for you, you're gonna act like that to me." Calabrese then says "Pull his motherfuckin' shirt up" and "drop the drawers too." Defendant added "Let me tell you something. Anything fuckin' happens, anything happens to me, anything around here, we'll fuckin' kill you, your fuckin' family." He also added "if something happened to me or him, your fuckin' kid'll go first, not by our request." In addition, Defendant told Frank "you be happy you're gonna walk outta here because if it was up to fuckin' me right now, I'll fuckin' do you in." Frank is expected to testify that they searched, interrogated, beat and threatened him because they wanted to ensure that he was not wearing a recording device or cooperating with law enforcement regarding the criminal activity in which he and Defendant had engaged, including the conduct charged in Counts Four and Six of the Indictment. After he left, Frank required emergency room treatment for head and facial trauma.

II. The Taped Conversation is Relevant to the Charges in the Indictment

Defendant asserts that the taped encounter involves an "unknown dispute" that has "nothing to do with the robbery and firearms charges Calabrese faces in this case." He further argues that it is inadmissible because the statements do not refer to the robberies in the indictment. The Court disagrees.

Cooperating Witness Frank is expected to testify that he engaged in criminal activities with Defendant, including the armed robberies charged in Counts Four and Six of the Indictment. He is further expected to testify that Defendant was suspicious that Frank was cooperating with law enforcement in connection with these activities when they met on January 31, 2002. As a result and as captured on tape, Defendant searched him for a recording device, threatened Frank if anything happened to Defendant, and then beat Defendant for the same reason. Such evidence of Defendant's violent attempt to threaten a cooperating witness who will testify regarding the charges in this case is evidence of Defendant Calabrese's consciousness of guilt. As the Seventh Circuit has held "[e]vidence that the defendant threatened a potential witness or a person cooperating with a government investigation is relevant to show the defendant's consciousness of guilt." *United States v. Miller,* 276 F.3d 370, 373 (7th Cir. 2002), *citing United States v. Thomas,* 86 F.3d 647, 655 (7th Cir. 1996); *United States v. Balzano,*

916 F.2d 1273, 1281 (7th Cir. 1990). The fact that neither Defendant nor Frank referenced the charged robberies does not change the analysis. Indeed, if Defendant had concerns that Frank was wearing a wire it is unlikely that he would have mentioned them.

III. The Probative Value of the Taped Confrontation is Not Substantially Outweighed by Unfair Prejudice

Defendant next argues that the Court should nonetheless exclude the tape pursuant to Rule 403 which provides that a court can exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403. Defendant Calabrese asserts that his comments "would shock and horrify a jury, while the value of the content of the tape to the prosecutions [sic] case is marginal, and any fact which the tape establishes that might be argued as relevant can be proved by other means by the prosecution." (R. 168-1, Defs. Motion at 4.) He argues that the violent nature of his statements, the extreme amount of profanity, and the threat to kill Frank's children if anything happens to Defendant will "cause the jury to hate him, fear him and convict him, regardless of the evidence or lack of evidence concerning the robbery charges." (*Id.*)

"Rule 403 was never intended to exclude relevant evidence simply because it is detrimental to one party's case; rather, the relevant inquiry is whether any unfair prejudice from the evidence substantially outweighs its probative value." *United States v. Dennis,* 497 F.3d 765, 769 (7th Cir. 2007) (citations omitted). Here, the taped confrontation evidencing Defendant's violent attempt to silent [sic] a participant in some of the alleged criminal activity charged in this case is directly relevant to Defendant's consciousness of guilt. As such, the risk of unfair prejudice does not outweigh its probative value. *Miller,* 276 F.3d at 374 (no risk of unfair prejudice if court had admitted threat evidence as probative evidence of defendant's consciousness of guilt). The Court, however, will grant a limited part of Defendant's motion – the government is directed to redact Defendant's statements that Frank's "kid'll go first" and all references to killing Frank's family and child.

For these reasons, Defendant's motion is granted in limited part and denied in part.

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Amy J. St. Eve	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	06 CR 239-1	DATE	4/7/2008
CASE TITLE	USA vs. Anthony Calabrese		

DOCKET ENTRY TEXT

The Court denies Defendant's motion for a new trial [239].

■ [For further details see text below.]

Notices mailed by Judicial staff.

STATEMENT

Following a jury trial, Defendant Anthony Calabrese was convicted of three counts of robbery in violation of 18 U.S.C. § 1951 and 2, and three counts of brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). Defendant now seeks a new trial. For the reasons below, Defendant's motion is denied.

Federal Rule of Criminal Procedure 33 ("Rule 33") provides for a new trial where, after considering the credibility of the witnesses, the court concludes that the jury's verdict is "so contrary to the weight of

the evidence that a new trial is required in the interest of justice." *United States v. Washington*, 184 F.3d 653, 657 (7th Cir. 1999). A court may also grant a new trial "in a variety of situations in which the substantial rights of the defendant have been jeopardized by errors or omissions during trial." *United States v. Eberhart*, 388 F.3d 1043, 1048 (7th Cir. 2004) (quoting *United States v. Kuzniar*, 881 F.2d 466, 470 (7th Cir. 1989), *overruled on other grounds by Eberhart v. United States*, 546 U.S. 12, 126 S. Ct. 403, 163 L. Ed. 2d 14 (2005). Defendant argues that the "interests of justice" require a new trial. Defendant makes several arguments purportedly supporting his motion. These arguments fail.

Defendant argues first that the Court committed error in admitting a redacted version of an audio tape recording in which Defendant can be heard physically assaulting a Government witness. For the detailed reasons stated in the Court's January 9, 2008 Minute Order, this evidence was properly admitted. (R. 175-1.)

Defendant next argues that the Court improperly denied Defendant's repeated motions to sever the counts against him. For the reasons stated in the Court's February 2, 2007 Minute Order, the Court denies Defendant's motion on this ground. (R. 132-1.) Further, the Court specifically instructed the jury at the end of the case that they had to consider each count of the indictment separately and render a unanimous verdict as to each count.

Defendant next argues that a new trial is warranted because the Government engaged in a series of improper leading questions. Defendant has not supplied the Court with a transcript of the trial. Nonetheless, Defendant's arguments fail. For starters, the Court sustained many of defense counsel's objections to leading questions during trial. To the extent Defendant failed to object to each question at trial, Defendant has waived those objections. Moreover, Federal Rule of Evidence 611 permits leading questions of friendly witnesses where "necessary to develop the witness' testimony." *See* Fed. R. Evid. 611. During the trial, the Court permitted some leading questions by the Government in order to both develop testimony and also to ensure that witnesses did not testify as to matters barred by the Court's rulings on motions *in limine* (regarding, for example, references to Defendant's membership in the mafia). Defendant cites two examples of leading questions which he argues prejudiced his case. First, Defendant takes issue with the Government's questioning which drew the answer "you tattooed the wrong girl." In this instance, leading was proper because there was a legitimate concern that the witness would mention the mafia in response to a more broad question. Second, Defendant takes issue with the Government's leading of witness Frank Masellis related to Mr. Masellis' in-court identification of Defendant. To the extent the Government's question was leading (again, Defendant has not supplied the Court with a transcript), it was clearly not prejudicial because Mr.

Masellis had previously testified that Defendant looked similar to the man that had robbed him. Moreover, numerous other witnesses had indicated that Defendant participated in the robbery of Mr. Masellis.

Without citing any case law, Defendant next argues that he is entitled to a new trial because "the court erred by denying defense adequate *voir dire* of the jury venire." This argument also fails. Defendant submitted in excess of 100 questions to the Court as potential questions for *voir dire*. To the extent Defendant failed to object to the Court's procedure at trial, Defendant has waived that objection. The Court then posed a series of questions to each potential juror, including some of the questions submitted by Defendant. The Court also offered the parties an opportunity to pose follow-up questions to the Court if the questioning of a potential juror raised particular issues – Defendant for the most part declined to do so. To the extent Defendant failed to request particular follow-up questions of the particular members of the venire, he has waived this argument.

The Court has broad discretion to question potential jurors during *voir dire*, *see, e.g.*, *United States v. McAnderson*, 914 F.2d 934, 942 (7th Cir. 1990), and Defendant has failed to raise any particular issue with the Court's questioning in this case. Nor has Defendant articulated a specific argument as to how the Court's questioning denied him his ability to intelligently exercise peremptory challenges. *See*

Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) ("lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges"). Instead, Defendant recites a vague proposition of law without applying it to the facts of his case or otherwise developing an argument. (R. 239-1, at ¶ 6.) Defendant's undeveloped argument fails. *See e.g., United States v. McLee,* 436 F.3d 751, 760 (7th Cir. 2006) ("The weakness of this argument is difficult to overstate . . . it is not the obligation of this court to research and construct the legal arguments open to parties, especially when they are represented by counsel.").

Finally, Defendant argues that the Government failed to prove Defendant guilty of each charge beyond a reasonable doubt. Because the evidence in this case was nothing short of overwhelming, this argument also fails. The Government put forward the testimony of not less than ten co-schemers who all testified concerning Defendant's involvement in the three charged robberies. The Government also called a number of witnesses who personally viewed Defendant's efforts to transport or otherwise store a number of leather coats stolen in one of the heists. In addition to this testimony – which was by and large consistent – the Government introduced testimony from victims of the burglaries which further tied Defendant to the robberies. Moreover, the Government introduced wire-tap evidence which indicated that Defendant had attempted to cover up his crime by threatening and assaulting a

co-conspirator. What is more, the Government introduced documentary evidence linking Defendant to a rental vehicle used in one of the robberies.

The discussion above reveals that the extensive evidence introduced by the Government at trial does not "preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *United States v. Swan*, 486 F.3d 260, 266 (7th Cir. 2007). Accordingly, the Court denies Defendant's motion for a new trial.

UNITED STATES DISTRICT COURT

NORTHERN District of ILLINOIS

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	Case Number: 06 CR 239-1
ANTHONY CALABRESE	USM Number: 14614-424
	Steven R. Hunter Defendant's Attorney
	(Filed Jul. 18, 2009)

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

x was found guilty on counts(s) Counts I, II, III, IV, V, VI of the Renumbered Indictment filed on 2/8/2008 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §1951	Robbery	4/13/01	I
18 U.S.C. §1951	Robbery	7/24/01	III
18 U.S.C. §1951	Robbery	9/17/01	IV
18 U.S.C. §924(c)(1)(A)(ii)	Using/Carrying in a Firearm in Relation to a Crime of Violence	4/13/01	II

18 U.S.C. §924(c)(1)(A)(ii)	Using/Carrying in a Firearm in Relation to a Crime of Violence	7/24/01, 9/17-01	IV and VI

The defendant is sentenced as provided pages 2 through 13 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)___

X Count(s) any remaining counts ☐ is X are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

07/18/2008
Date of Imposition of Judgment

/s/ Amy J. St. Eve
Signature of Judge

Amy J. St. Eve,
United States District Court Judge
Name and Title of Judge

7-23-08
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

751 months = 67 months on Counts I, III, V to run concurrently to each other and to the remainder of the undischarged imprisonment imposed in 02 CR 448; 84 months on Count II to run consecutive to the sentence imposed on all other counts; and 300 months on each of Counts IV and VI to run consecutive to the sentence imposed on all other counts.

X The court makes the following recommendations to the Bureau of Prisons:

That defendant be placed in Lexington, Kentucky.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

ADDITIONAL IMPRISONMENT TERMS

The defendant shall undergo a mental health evaluation and treatment during his period of imprisonment.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Three years Counts I through VI to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and random drug tests thereafter, conducted by the U.S. Probation Office, not to exceed 104 tests per year.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable).

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay

in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use,

distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 600	$ WAIVED	$ 89,576.60

☐ The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
– The Hartford CRO Department P.O. Box 958457 Lake Mary, FL 32795 Claim Ref. No. 842 F 14836	$56,000	$56,000	
– State Farm Insurance Co. 2702 Ireland Grove Road Bloomington, IL 61709-0001 Claim Ref. No. 13-H753-432	$5,306.32	$5,306.32	
– Highlands Insurance Co. In Receivership ATTN: Sue Ligato 275 Phillips Blvd. Trenton, NJ 08618 Claim Ref. No. 123006069	$14,959.68	$14,959.68	
[text partially redacted in original]	$13,310.60	$13,310.60	
	$89,576.60	$89,576.60	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, for offenses committed on or after September 13, 1994 but before April 23, 1996.

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

X The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

X the interest requirement is waived for the ☐ fine X restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A x Lump sum payment of $ 90,176.70 due immediately, balance due

☐ not later than _____ , or

X in accordance ☐ C, ☐ D, ☐ E, or X F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

Payment in equal monthly installments of ten percent (10%) of the defendant's net monthly income.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

x Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

See next page.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

ADDITIONAL DEFENDANTS AND CO-DEFENDANTS HELD JOINT AND SEVERAL

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
Walter J. Polino, 06CR239-2	$61,306.32	$61,306.32	The Hartford CRO Department for $56,000 & State Farm Ins. for $5,306.32

Sean M. Smith, 06CR239-3	$61,306.32	$61,306.32	Same as Above
Marcus Baker, 06CR239-4	$61,306.32	$61,306.32	Same as Above
David R. Sims, 06CR239-5	$14,959.68	$14,959.68	Highlands Insurance Co. in Receivership
Richard P. Dawson, 06CR239-6	$14,959.68	$14,959.68	Highlands Insurance Co. in Receivership

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 06 CR 239-1
Plaintiff,	)	
vs.	)	
ANTHONY N. CALABRESE,	)	Chicago, Illinois
	)	July 18, 2008
Defendant.	)	9:10 o'clock a.m.

TRANSCRIPT OF TRIAL PROCEEDINGS –
SENTENCING BEFORE THE
HONORABLE AMY J. ST. EVE

APPEARANCES:

For the Plaintiff:	HON. PATRICK J. FITZGERALD United States Attorney BY: MR. JOEL HAMMERMAN MR. T. MARKUS FUNK 219 S. Dearborn St., Suite 500 Chicago, Illinois 60604
For the Defendant:	MR. STEVEN R. HUNTER 820 W. Jackson Blvd., Suite 310 Chicago, Illinois 60607
Also Present:	MS. SANDRA DeNICHOLAS, Probation
Court Reporter:	MR. JOSEPH RICKHOFF Official Court Reporter 219 S. Dearborn St., Suite 1232 Chicago, Illinois 60604 (312) 435-5562

[83] didn't have that opportunity. And, I mean, at 57 years, six years off of that, doesn't seem like much, but I will be back here because I have appeals and it's not over until God says it's over. That's what I believe.

I have over 35 people here for me today. I thank each and every single one of them, and I love them, and their support is overwhelming and I'm grateful and happy.

I ask you, please, to sentence me to the minimum.

Thank you for your time.

THE COURT: Thank you, Mr. Calabrese.

I am going to take about a ten-minute recess. I want to read the Roberson case you have handed up to me; and, then, I will be back at, say, ten after 11:00. I will impose sentence then.

(Brief recess.)

THE COURT: Mr. Hunter, would you please come forward with your client.

Mr. Calabrese, you have been convicted on six counts by the jury for very violent behavior. I heard the testimony from the victims, from the mother of the owner of the leather shop and the fear that she went through, especially at her age; from the owner of the tattoo shop whose hands were ordered broken; from the individual at the meat market who you threatened that you would kill him and his family if he went to the authorities; from the tape that I heard

your own words [84] on of Mr. Frank and the beating of Mr. Frank and where you threatened to kill him and his son if he was cooperating with the government.

I have to say that from probably the first time that you have come into court, Mr. Calabrese, that your behavior in court has not squared with the underlying conduct in here. You have always been extremely cooperative coming into court, respectful. I have never seen your conduct in court show any indication of this violent behavior. And I have often thought how did somebody like you get yourself into this position.

In sentencing you, the Court looks to the factors in Section 3553, as I am directed to. This case is somewhat unique because I must sentence you, by law, to at least 57 years because of the statutory mandatory minimum on the gun charges. I do not have any discretion over that. That is something that I must tag on to run consecutive to any sentence that the Court imposes.

In sentencing you, Mr. Calabrese, I also read Roberson, the Seventh Circuit case, that I must consider the robberies at issue here independent of the 924(c) add-ons.

And I will be, for the record, Mr. Hunter, the first to tell you for purposes of appeal that if I am wrong in that reading, then this case should come back for resentencing because I would do it differently if I am wrong in that reading. The 57 years is mandatory.

[85] In looking at the Guideline range independently – the 135 to 168 months independently – for the underlying conduct, I am looking to and guided by the 3553 factors.

The nature and circumstances of the offense, I have already addressed that, the violent nature of it.

Your history and characteristics. I am talking about two different people it almost seems like, Mr. Calabrese, what have seen in court during the course of the trial in contrast to all of the letters of support that the Court has received. Your certificates I note and am impressed by your activities since you have been in prison and your efforts at rehabilitation. And I agree with Mr. Hunter that you certainly seem to be on your way to rehabilitating yourself.

I note your tremendous family support and take that into consideration in looking at your history and characteristics.

The sentence the Court will impose on the underlying robbery will reflect the seriousness of the offense, promote respect for the law and justly punish you for the offense. It will also adequately deter criminal conduct.

In looking at that factor, I think I must look, in part, to the 57 years that will be added on. And in protecting you for the public, I think I must look, in part, to the fact that with the 57 years when you – if you are released from prison and if you make it that

long as a [86] 42-year-old man, that you certainly are not going to be a threat to the public at that point.

The term of imprisonment will also provide you with educational, vocational training, which you have already shown that you are taking advantage of.

For those reasons, I do believe that the Guideline range is too high. And I cannot help but be influenced somewhat by the 57 years that are added on to the sentence, for the reasons I've just articulated.

But, nonetheless, I am bound by the Seventh Circuit, and I must sentence you on the underlying crimes independently. I am influenced significantly in protecting the public and the fact that that 57 years is tagged on; and, when you are released, you will be an old man.

I am deviating from the Guidelines.

Pursuant to the Sentencing Reform Act of 1984, Mr. Calabrese, it is the judgment of the Court that you are hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 67 months on Counts 1, 3 and 5, to run concurrently to each other and concurrently to the remainder of the sentence imposed in Docket No. 02 CR 448; so, the remainder of your six-year sentence that you were serving at the time you were charged with this case.

You are hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 84 months – or [87] seven years – on Count 2, as mandated by statute, to run consecutive to the sentence

imposed on all other counts and, on each of Counts 4 and 6, to 300 months each – or 25 years each – as mandated by statute, to run consecutive to the sentence imposed on all other counts.

Pursuant to 18, United States Code, Section 3663(a), you are hereby ordered to pay mandatory restitution in the amount of $56,000 to the Hartford Insurance Company and $5,306.32 to State Farm on the Leather Connection robbery; $14,959.68 to Highlands Insurance Company, now known as Highlands Insurance Company in Receivership; and, $13,310.60 on the Metamorphosis robbery.

You must pay a special assessment, Mr. Calabrese, of $600, which is due immediately. That is by statute. $100 on each count of conviction.

THE DEFENDANT: Yes.

THE COURT: The interest associated with your financial obligation along with the costs of incarceration and supervision are waived, given the amount of restitution and your inability to pay.

THE DEFENDANT: Thank you.

THE COURT: You shall undergo a mental health evaluation during your period of imprisonment.

Upon your release from imprisonment, you shall be placed on supervised release for a term of three

years on [88] Counts 1 through 6, to run concurrently to each other.

While on supervised release, you shall not commit another federal, state or local crime; you shall comply with the standard conditions that have been adopted by this Court; and, also comply with the following additional conditions.

You shall refrain from any unlawful use of a controlled substance.

You shall submit to one drug test within 15 days of your release from imprisonment and random drug tests thereafter conducted by the U.S. Probation Office, not to exceed 104 tests per year.

You shall submit to the collection of a DNA sample at the direction of the U.S. probation officer to the extent such a sample is authorized.

You shall not possess a firearm or a destructive device.

Mr. Calabrese, I hope – this is a lengthy sentence – everybody in this courtroom realizes that – because of the statutory terms on the gun charges. I hope that you continue on the route that you have been on in prison, continue to help others and continue to help and better yourself.

You have the right to appeal both the conviction in this case, sir, as well as the sentence imposed by this Court. If you wish to do so, you have ten days to file a Notice of [89] Appeal with the Seventh Circuit,

and you can speak to Mr. Hunter about how to go about doing that.

Is there a particular facility, Mr. Hunter, you would like me to recommend to the Bureau of Prisons?

THE DEFENDANT: I am on a writ from Lexington, Kentucky. So, more than likely, they would put me back there.

MR. HUNTER: I think he'd like to go back to Lexington, but until the writ – I talked to Mr. Hammerman. He indicated the writ would be lifted –

THE COURT: I will order today – because the writ was the one I entered –

MR. HUNTER: Oh, okay.

THE COURT: – in this case.

I will order that the writ be lifted and you can be returned to – if that is where the Bureau of Prisons deems appropriate, you can be returned to – Lexington, Kentucky, where you originated.

I do not know, Mr. Calabrese, if they will do that. I will certainly recommend that you serve your time at that facility. All I can do is recommend. It is up to the Bureau of Prisons to determine where you should serve your time. But I will order the writ lifted and the marshals and the Bureau of Prisons can return you to the facility that you came from.

THE DEFENDANT: That particular facility is an administrative. So, there's people doing a year there and

* * *

FRANK: The next day. I got arrested Sunday morning, after the prints came back and they found out who I was, that's when they came me the bond.

(Irrelevant Conversation Redacted)

FRANK: And I don't know what happened at court, I had court Friday, which I missed, so I probably got another warrant.

CALABRESE: Well, that's shit that you should take care of, so fuck, all you gotta do is go with your papers and fuckin' present it in front of a judge, you know, you got a court date coming up in Markham, Tuesday, the 5th. Did you know that?

FRANK: No. For what?

CALABRESE: I suggest you bring your fuckin' papers that show you were in jail and fuckin' . . .

(Phone ringing)

CALABRESE: . . . present that to the judge, otherwise, you'll be fuckin' looking' for fuckin' . . .

(Irrelevant Conversation Redacted)

CALABRESE: So, yeah, I don't know, maybe if it is the fuckin' FBI, they fuckin' rather pop you with something else or fuckin' try and squeeze you about me, I don't fuckin' know.

(Irrelevant Conversation Redacted)

FRANK: Well, how much do I owe you?

CALABRESE: That fuckin', the bond is 800, um, a thousand on that thing.

FRANK: $300 for the car.

CALABRESE: Yeah, I can't, I don't even fuckin' know. What else was there?

FRANK: That's it? As far as I know.

CALABRESE: Twenty one. So, I mean, if she wants her shit or the kid's shit, that's fine. You know what I mean? Your chain, all your fuckin', your, everything else, I don't give a fuck, I don't want it. So, are you fuckin' generating any money or no?

FRANK: I got a little hustle goin'.

CALABRESE: I mean any little stupid shit you know that goes on around here, you know to keep your mouth shut. I mean you understand what'll happen?

FRANK: Tony, do I look like I wanna be dead?

COOPER: No one said . . .

CALABRESE: Nobody said you're gonna be dead.

FRANK: I, I know the seriousness of what goes on here. I ain't stupid.

CALABRESE: There ain't no seriousness. I mean, you know when people get in trouble sometimes they fuckin' make shit up. We don't want you to fuckin' be making anything up, that's all. I fuckin' bust my balls here all day long, I got enough fuckin' shit going on here. I don't need no, don't need nobody else to fuckin' start rumors or fuckin' shit, so. Is this the number to get a hold of you?

FRANK: Mmm, hmm.

COOPER: What is that your cell phone?

FRANK: Mmm, hmm.

COOPER: Where you living at?

FRANK: In a hotel.

COOPER: Which hotel?

FRANK: Eh, why is that all that necessary?

COOPER: Because I asked for it, that's why.

CALABRESE: Yeah, why?

FRANK: Tony, I don't really feel safe to say.

COOPER: Why not?

CALABRESE: Fuck you, motherfucker, fuck you, what did you say? Fuck you. (UI).

(Fighting in the background)

FRANK: I'm sorry, I'm sorry, I'm sorry, I'm sorry.

CALABRESE: Fuck you.

FRANK: I'm sorry, I'm sorry, I'm sorry.

CALABRESE: Cocksucker. Fuckin' did everything for you, you're gonna act like that to me.

FRANK: I'm sorry Tony.

CALABRESE: Fuck you.

COOPER: Punk ass bitch. Get your ass buck up. You wanna feel safe? I'll give you something safe. Remember the last time, I told you? Do you?

FRANK: Yes sir.

CALABRESE: Pull his motherfuckin' shirt up. Make sure he's got nothing on.

COOPER: Strip. Strip.

(Phone ringing)

(Talking on phone)

CALABRESE: Hello? Hello?

COOPER: Let me have the whole fuckin' nine yards, too.

CALABRESE: You're a motherfucker. You're a motherfucker.

COOPER: Drop the drawers too.

CALABRESE: That's alright (UI).

COOPER: No, drop drawers, I don't give a fuck about none of it, Tone. Twist your ass around.

FRANK: I ain't got nothing.

CALABRESE: You don't fuckin' feel safe. What the fuck kind of shit is that?

FRANK: (UI)

CALABRESE: Sitting there with a motherfuckin' shit-eating grin smirk on your fuckin' face.

FRANK: I ain't got no smirk on my face.

CALABRESE: No, you did before.

COOPER: Now you don't.

CALABRESE: Let me tell you something. Anything fuckin' happens, anything happens to me, anything around here, we'll fuckin' kill you . . .

(Irrelevant Conversation Redacted)

COOPER: Which one is this for?

FRANK: It's for Matteson.

CALABRESE: I'll tell you right now, you be happy that you're gonna walk outta here because if it was up to fuckin' me right now, I'll fuckin' do you in. You leave now, you need your fuckin', the fuckin' money, we do our thing and we're done. I don't wanna

hear your name, you don't fuckin' say my name. You're gettin' a fuckin' pass Eddie, you're gettin' a fuckin' pass. And I fuckin' told you, go to your fuckin' kids house, be with your fuckin' kid. You ain't got, you fuckin' lied, you lied to her saying you were afraid of me that's why you weren't with your family. You lied to her. I told you, what did I tell you? Get the fuck back home with your family where you belong. So, don't fuckin' come here with that fuckin' punk-ass motherfucker . . . I wanna fuckin' knock your head off. You better get fuckin' dressed, get the fuck outta here before I fuckin' change my mind.

COOPER: What motel?

FRANK: Holiday Inn.

COOPER: Which one?

FRANK: In Matteson.

COOPER: You better be there, Eddie. You switch, I gotta come looking for you . . .

CALABRESE: Yeah, you let us know. And we don't need to fuckin' come and find you. We'll fuckin' do it right here. We don't want to, but don't fuckin' talk to me like that. I'm afraid, you're afraid. With the way you fuckin' come up in here, you weren't fucking afraid, were ya? And then sittin' there with that fuckin' smirk on your face, talking about, pissed off cause your brother came here. That didn't have nothing to do with nothing. That's been the last 10 days.

COOPER: Let me remind you of something. Anything comes to me, him, anybody else at this shop . . .

CALABRESE: Yeah. Brian neither.

COOPER: . . . . or our families.

CALABRESE: Brian too.

FRANK: I know. I know.

COOPER: Or our families.

CALABRESE: That was a fuckin' punk move what you did there.

COOPER: Or our families. And, and I do mean that.

(Irrelevant Conversation Redacted)

CALABRESE: And you take this like a fuckin' man, thank God that you're able to walk outta here. And you brought it on yourself, Eddie.

COOPER: Forget about anything that ever happened here. Anything.

CALABRESE: Exactly. You brought this on yourself. Remember that Eddie. You fuckin' came here with that little punk attitude and don't wanna tell me and him. Guys that would of fuckin' did anything for you. You fucked up something in your life that you'll never find again. You'll never find two motherfuckers who fuckin' took somebody in. There's motherfuckin' guys that wanna hang with us and be

with us. But, no, we take you in, just consider it, it's fuckin' done and over with, that's it.

(End of conversation)

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No. 09-446

In the Supreme Court of the United States

ANTHONY CALABRESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a district court, in sentencing a defendant for both an offense under 18 U.S.C. 924(c) and a predicate crime of violence or drug trafficking crime, may reduce the sentence for the underlying crime in order to compensate for the mandatory minimum sentence required for the Section 924(c) offense.

2. Whether the court of appeals incorrectly applied harmless-error principles in reviewing petitioner's appeal by failing to consider the cumulative effects of alleged errors.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 572 F.3d 362.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 2009. The petition for a writ of certiorari was filed on October 13, 2009 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of three counts of robbery of a commercial establishment, in violation of 18 U.S.C. 1951, and three counts of brandishing a firearm during and in relation to

the commission of those robberies, in violation of 18 U.S.C. 924(c). He was sentenced to 751 months of imprisonment, to be followed by three years of supervised release. Pet. App. 30-42. The court of appeals affirmed. *Id.* at 1-16.

1. Between April and September 2001, petitioner orchestrated the armed robberies of three Chicago-area businesses. First, petitioner and several other men, one brandishing a pistol, bound two victims at a leather goods store with duct tape before stealing leather coats and roughly $10,000 in cash. Pet. App. 3-4. Next, individuals acting at petitioner's direction raided a tattoo parlor at gunpoint, tied up the occupants, stole the establishment's equipment, and pounded with a hammer the hands of one tattoo artist in retaliation for his tattooing of a mob boss's daughter. *Id.* at 4-5. Finally, petitioner and his associates robbed a butcher shop of $15,500. Petitioner himself wielded a firearm during that offense and told the shop's owner that if he did not keep quiet, his children would be killed. *Id.* at 5-6.

A few months after these events, one of petitioner's accomplices in two of the robberies, Ed Frank, began cooperating with the government. While wearing a wire, Frank met with petitioner, who made references to criminal activity, issued death threats, and beat Frank. Pet. App. 6-9.

2. A grand jury indicted petitioner on three counts of robbery of a commercial establishment, in violation of 18 U.S.C. 1951, and three counts of brandishing a firearm during and in relation to the commission of those robberies, in violation of 18 U.S.C. 924(c). The district court denied petitioner's motion to sever the counts of the indictment and to try each robbery separately. Pet. App. 10. The case proceeded to trial, and, after hearing

the testimony from many of petitioner's victims and accomplices, as well as the audio recording of Frank's conversation with petitioner, the jury found petitioner guilty on all six counts. *Id.* at 6-7.

3. In imposing sentence, the district court was required by 18 U.S.C. 924(c) to impose three consecutive terms of imprisonment of seven, 25, and 25 years for each of petitioner's three firearms convictions. Those sentences yielded a total mandatory minimum sentence of 57 years, or 684 months, to run consecutively to the sentence for any other count of conviction. See 18 U.S.C 924(c)(1)(A)(ii) and(C)(i). On the three robbery convictions, which carried no mandatory minimum, the presentence investigation report (PSR) recommended a total advisory Guidelines range of 135 to 168 months of imprisonment. PSR 22; 7/18/08 Sent. Tr. 39. The PSR noted that, because petitioner was subject to the mandatory minimum sentences specified in Section 924(c), he was not subject to a six-level firearms enhancement in the base offense level for his robbery offenses. See Sentencing Guidelines § 2B3.1(b)(2)(B) (imposing a six-level enhancement if a firearm is used during a robbery); Sentencing Guidelines § 2K2.4 cmt. n.4 ("If a sentence under [Section 924(c)] is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense.").

Petitioner requested that the court "impose no additional time" on the robbery counts. 7/18/08 Sent. Tr. 65; see Def. Sent. Memo. 7 (asking to be sentenced to the "statutory mandatory minimum sentence, 684 months"). While acknowledging at the sentencing hearing that the exact sentence on the robbery counts "may be an aca-

demic discussion" because petitioner was already in his late 40's and "would be an extremely old man * * * if he were to live out his sentence of 57 years" required by statute, petitioner's counsel nevertheless advocated for an "extremely low" additional period of imprisonment. 7/18/08 Sent. Tr. 67.

The district court noted that it was required by *United States* v. *Roberson*, 474 F.3d 432 (7th Cir. 2007), to "consider the robberies at issue here independent of the 924(c) add-ons." Pet. App. 45. In undertaking that evaluation, the district court balanced the "violent nature" of petitioner's offense against several mitigating factors. *Id.* at 46. The court noted that petitioner had taken advantage of his time in prison to complete educational and vocational training and had strong family support. *Ibid.* It also recognized that, in light of the consecutive 57-year sentence it was required to impose, additional time was not needed to protect the public from further crimes. *Id.* at 46-47. After weighing these factors, the court varied from the Guidelines and imposed a sentence of 67 months, less than half of the low end of the advisory Guidelines range. *Id.* at 47. The district court further stated that, had it been permitted to consider the consecutive firearms sentences in setting the punishment for the robbery convictions, it would have analyzed the sentence differently on those counts. *Id.* at 45.

4. The court of appeals affirmed. Pet. App. 1-16. The court first rejected petitioner's claim that the district court had abused its discretion in denying his severance motion. *Id.* at 10-12. It disagreed with petitioner's contention that "the evidence was shaky as to his involvement in each individual robbery," instead deeming that evidence to be "overwhelming." *Id.* at 11-

12. The court of appeals also noted that the district court had instructed the jury to consider each count separately and that much of the evidence of the other robberies would have been admissible at separate trials under Federal Rule of Evidence 404(b). *Ibid.* In light of these considerations, the court concluded that any prejudicial spillover from trying the counts together "was harmless" and thus that petitioner had "failed to establish that holding a single trial caused him actual prejudice." *Id.* at 12.

The court next found that the district court committed no abuse of discretion in permitting the jury to hear the audiotape of petitioner's conversation with Frank. Pet. App. 12-13. The court of appeals held that a "reasonable person" could conclude "that the conversation on the audiotape was relevant and that, with the worst parts excised, its probative value was not substantially outweighed by the danger of unfair prejudice." *Id.* at 12. After finding that the contents of the audiotape were plainly relevant, the court recognized that the question of prejudice was "a closer call." *Id.* at 13. In the end, however, the court concluded that, while it would have been reasonable for the district court to provide the jury with a transcript instead of playing the tape itself, it was equally reasonable to think "that the tape worked better overall." *Ibid.* The court therefore found "no abuse of discretion." *Ibid.*

The court of appeals also rejected petitioner's claim of insufficient evidence, which was grounded in an attack on the credibility of the witnesses who testified against him. Pet. App. 13-14. The court refused to second-guess the jury on that point, concluding that "minor inconsistencies" in the testimony of some of petitioner's accomplices or the possible existence of a "motive to lie" did

not render that testimony legally incredible, and that, if those witnesses were believed, the jury had received more than sufficient evidence to convict. *Id.* at 14.

Turning to petitioner's sentence, the court of appeals recognized that the district court had properly applied the holding in *Roberson* "that the mandatory add-on sentence flowing from using a gun in a crime of violence may not be used to justify a lower sentence on the underlying offense." Pet. App. 14 (citing *Roberson*, 474 F.3d at 436). While accepting for purposes of argument petitioner's claim that "the law may *possibly* be different in other circuits," the court reasoned that "the rule we adopted [in *Roberson*] is the only choice consistent with separation-of-powers principles" and noted that at least three other courts of appeals had agreed with its conclusion. *Id.* at 15-16. Considering petitioner's "pivotal role" in three violent robberies, the court of appeals concluded that petitioner's "*below-guidelines* concurrent sentences of 67 months on each of the three robbery counts is not unreasonable." *Id.* at 16.

ARGUMENT

1. Petitioner contends (Pet. 12-21) that the decision below perpetuates a disagreement among the courts of appeals concerning whether a district court may consider the effect of consecutive mandatory minimum sentences when fashioning a sentence on other counts of conviction. There is no circuit conflict on that question, and the decision below is correct. Any disagreement between the decision below and various district court decisions does not warrant this Court's attention, especially because petitioner himself has conceded that the dispute in this case is largely academic. Further review therefore is not warranted.

a. As petitioner acknowledges (Pet. 4, 13), four courts of appeals have concluded that a district court may not consider a consecutive sentence imposed for a violation of 18 U.S.C. 924(c) when selecting a reasonable sentence for the predicate offense under 18 U.S.C. 3553(a). See Pet. App. 14; *United States* v. *Chavez*, 549 F.3d 119, 135 (2d Cir. 2008); *United States* v. *Hatcher*, 501 F.3d 931, 933 (8th Cir. 2007), cert. denied, 128 S. Ct. 1133 (2008); *United States* v. *Franklin*, 499 F.3d 578, 584-585 (6th Cir. 2007).

The reasoning and result of those decisions are correct. Section 3553(a) requires a court to consider a host of general factors in setting a defendant's total sentence, but those standards do not apply where "otherwise specifically provided." 18 U.S.C. 3551(a). Section 924(c)(1)(D)(ii) specifically provides that, "[n]otwithstanding any other provision of law, no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." As the courts of appeals have recognized, that prohibition on concurrent sentences is intended to ensure that the penalties for using or carrying a firearm during a crime of violence are imposed over and above

any sentence for the underlying crime.[1] *Chavez*, 549 F.3d at 134; *Roberson*, 474 F.3d at 434-436.

Petitioner's argument conflicts with Congress's prohibition in Section 924(c)(1)(D) on concurrent punishments. Reducing the sentence on the underlying crime to compensate for the mandatory minimum sentence under 18 U.S.C. 924(c) would effectively result in a sentence for that crime that, to the extent of the reduction, runs concurrent with the sentence for the 924(c) offense. See *Chavez*, 549 F.3d at 135 ("if the court reduces the prison term imposed for that underlying count on the ground that the total sentence is, in the court's view, too severe, the court conflates the two punishments and thwarts the will of Congress"). Thus, as the court of appeals concluded, the proper way to reconcile the Congressional commands in Sections 3553(a) and 924(c) is to require that a sentencing judge determine the appropriate punishment for the underlying offense without reference to the mandatory sentence required under Section 924(c).

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[1] An application note to the Sentencing Guidelines provision corresponding to 18 U.S.C. 924(c) recognizes that "a term of imprisonment imposed [under Section 924(c)] shall run consecutively to any other term of imprisonment." Sentencing Guidelines § 2K2.4 cmt. n.2(B). The commentary further directs that, when sentencing a defendant for both a Section 924(c) offense and the underlying crime, the district court should not "apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense," because "[a] Sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction." Sentencing Guidelines § 2K2.4 cmt. n.4. As noted above, see p. 3, *supra*, the PSR followed that instruction in calculating petitioner's advisory Guidelines range on the robbery offenses.

b. Contrary to petitioner's argument, there is no conflict among the courts of appeals on this question. Petitioner first points (Pet. 4-5, 14) to several district court decisions imposing sentences for predicate offenses significantly below the advisory Guidelines range on defendants who also received mandatory consecutive sentences under Section 924(c). See *United States* v. *Barton*, 442 F. Supp. 2d 301, 303-304 (W.D. Va. 2006), aff'd, 216 Fed. Appx. 355 (4th Cir.), cert. denied, 552 U.S. 835 (2007); *United States* v. *Ciszkowski*, 430 F. Supp. 2d 1283, 1289 (M.D. Fla. 2006), aff'd, 492 F.3d 1264 (11th Cir. 2007); *United States* v. *Ezell*, 417 F. Supp. 2d 667, 678 (E.D. Pa. 2006), aff'd, 265 Fed. Appx. 70 (3d Cir.), cert. denied, 129 S. Ct. 655 (2008); *United States* v. *Angelos*, 345 F. Supp. 2d 1227, 1260-1261 (D. Utah 2004), aff'd, 433 F.3d 738 (10th Cir.), cert. denied, 549 U.S. 1077 (2006). But those district court decisions are not precedential and do not establish a conflict warranting this Court's review. See Sup. Ct. R. 10(a). Although each judgment was affirmed, none of the courts of appeals considering them expressed any opinion on the propriety of the sentence the district court imposed. Nor did the courts of appeals "allow[ ]" (Pet. 14) the district courts to take the actions they did. Because the government did not cross-appeal in any of those cases, the courts of appeals had no power to correct the improper sentences even if they had wished to do so. See *Greenlaw* v. *United States*, 128 S. Ct. 2559, 2562 (2008). When squarely faced with a government challenge to such a sentence, there is no reason to doubt that the Third, Fourth, Tenth, or Eleventh Circuits would agree with the analysis of the four courts of appeals that have confronted the issue and conclude that district courts may not reduce the sentence for an underlying predicate

offense to compensate for the mandatory minimum sentence required by 18 U.S.C. 924(c).

Petitioner incorrectly argues (Pet. 15-16) that there is a conflict between the decision below and *United States* v. *Vidal-Reyes*, 562 F.3d 43 (1st Cir. 2009). *Vidal-Reyes* deals not with a consecutive sentence under 18 U.S.C. 924(c) but with the federal aggravated identity theft statute, 18 U.S.C. 1028A. Unlike 18 U.S.C. 924(c), that statute specifies that the district court shall not reduce the term of imprisonment "for the felony during which the means of identification was transferred, possessed, or used" to take into account the mandatory consecutive sentence specified in Section 1028A(a)(1). 18 U.S.C. 1028A(b)(2). To give effect to the plain meaning of that provision, the First Circuit held that district courts may consider the mandatory minimum sentence "when sentencing for *non-predicate* offenses." *Vidal-Reyes*, 562 F.3d at 51. In reaching that conclusion, however, the court of appeals explicitly considered the cases interpreting 18 U.S.C. 924(c), including the Seventh Circuit's decision in *Roberson*, and found them "easily distinguishable" based on "significant differences" in the relevant statutory text. *Vidal-Reyes*, 562 F.3d at 52. Among other things, the court in *Vidal-Reyes* noted in particular that the cases interpreting Section 924(c) have applied its "bar on considering the mandatory term in sentencing on other counts of conviction" only "to sentencing for predicates of the § 924(c) offense." *Ibid.* The First Circuit therefore expressed in dicta the view that there existed "an implied sentencing limitation in § 924(c) that mirrors the express sentencing limitation in the text of § 1028A(b)(3), which applies to *predicate* offenses only." *Ibid.* The convictions at issue here were all predicate offenses to petitioner's convictions under

Section 924(c), and therefore, even under the First Circuit's reasoning, the district court in this case could not have considered the mandatory minimum penalty on the firearms offenses when imposing sentence.

There is similarly no merit to petitioner's contention (Pet. 17-18) that the decision of the court of appeals conflicts with *United States* v. *Guthrie*, 557 F.3d 243 (6th Cir. 2009). In *Guthrie*, as in this case, the district court imposed a predicate offense sentence of approximately half the advisory Guidelines range. *Id.* at 247. While the Sixth Circuit upheld the reasonableness of that sentence, it specifically reaffirmed its holding in *Franklin* that a court may not "try[] to negate the mandatory minimum sentence for use of a firearm during a crime of violence." *Id.* at 255. Because there was no evidence other than "mere inference" that the below-range sentence for the predicate offense in *Guthrie* reflected an attempt to compensate for the consecutive sentence mandated by Section 924(c), rather than an honest and independent evaluation of the other factors under 18 U.S.C. 3553(a), the panel found no violation of *Franklin*.[2] *Guthrie* is thus consistent both with *Franklin* and the decision below.

c. Contrary to petitioner's argument (Pet. 18-20), the court of appeals' reasoning does not conflict with *Kimbrough* v. *United States*, 552 U.S. 85 (2007). *Kimbrough* permits district courts to vary from the advisory Sentencing Guidelines range based on general disagreements with the Guidelines themselves. *Id.* at 101. But *Kimbrough* does not authorize sentencing courts to dis-

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[2] In any event, any intracircuit conflict between *Franklin* and *Guthrie* should be resolved by the Sixth Circuit. The existence of such intracircuit tension does not give rise to a need for this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

agree with Acts of Congress governing their actions or to impose sentences in violation of statutory commands. As this Court explained in *Kimbrough*, "sentencing courts remain bound by the mandatory minimum sentences" Congress specifies. *Id.* at 107. Similarly, sentencing courts must respect the congressional directive in Section 924(c)(1)(D)(ii) that the sentence selected for a predicate offense not run concurrently with the mandatory minimum sentence commanded in Section 924(c)(1)(A)—a directive that would be thwarted by reducing the otherwise-appropriate sentence on the predicate offense because of the Section 924(c) sentence. Nothing in *Kimbrough* counsels otherwise.

d. Finally, even if the Court wished to address the question presented, petitioner's case would not provide a suitable vehicle. Petitioner, age 49, is currently scheduled for release from imprisonment on July 19, 2061. Even were the 67-month sentence imposed for his robbery convictions to be eliminated entirely, the unchallenged 57-year mandatory minimum sentence petitioner faces for his firearms convictions would extend his term of imprisonment well beyond his natural life expectancy. Any error in this case thus would be essentially academic and would not justify this Court's review.

2. Petitioner also contends (Pet. 21-26) that the court of appeals misapplied principles of harmless error and cumulative error analysis. The court of appeals' correct rejection of that argument does not merit this Court's review.

The general principles governing harmless-error analysis are well settled. When a court of appeals concludes that an error occurred during a criminal proceeding, it must nonetheless affirm the judgment if the error had no effect on the outcome of the trial or the substan-

tial rights of the parties. Fed. R. Crim. P. 52(a); see *Kotteakos* v. *United States*, 328 U.S. 750, 760 (1946). If a court finds more than one error, it must consider the cumulative effect of all those errors in evaluating harmlessness. *Taylor* v. *Kentucky*, 436 U.S. 478, 487 n.15 (1978); *United States* v. *Diharce-Estrade*, 526 F.2d 637, 642 (5th Cir. 1976).

The cumulative error doctrine has no application here. "[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors." *United States* v. *Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990). In this case, the court of appeals rejected each of petitioner's three claims of error on the merits. Considering the deferential standard of review, the court found no abuse of discretion and no evidence of actual prejudice to petitioner in the district court's refusal to sever the counts of the indictment for trial. Pet. App. 10-12. It also found no reversible error in the admission of the audiotape, and it concluded that more than sufficient evidence was introduced to support the convictions. *Id.* at 12-14. Although the court did hold in the alternative that any error on the severance issue was harmless, it found no error at all on petitioner's other two claims. And when only a single trial error is found, there is nothing to cumulate under the cumulative-error doctrine. Cf. *United States* v. *Conner*, 583 F.3d 1011, 1027 (7th Cir. 2009).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 09-446

IN THE
Supreme Court of the United States

ANTHONY CALABRESE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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INTRODUCTION

Mr. Calabrese's petition for certiorari sets forth a clear, significant, and mature three-way circuit split on a substantial and recurring question: whether, in the absence of explicit statutory language to the contrary, a district court has discretion to consider the effect of a mandatory minimum like 18 U.S.C. § 924(c) when applying the 18 U.S.C. § 3553(a) factors to fashion a predicate sentence.

The Government tries to downplay the circuit split by arguing that four circuits have merely affirmed, without comment, district-court decisions that considered the effect of a mandatory minimum when fashioning the predicate sentence, and by re-characterizing the holdings of two other circuits that have expressly condoned the same practice. Those arguments only amplify the need for review. If the Government's view of sentencing law is correct, then criminal defendants subject to consecutive, mandatory minimum sentences who are charged in the First, Third, Fourth, Tenth, and Eleventh Circuits are receiving sentences that are unlawfully shorter than what Congress intended. Conversely, if the Government's view of sentencing law is wrong, then identically situated defendants who are charged in the Second, Seventh, and Eighth Circuits are receiving sentences that are unlawfully longer than what Congress intended. Meanwhile, identically situated defendants who are charged in the Sixth Circuit may receive an unlawfully longer or shorter sentence, depending on the district-court judge. This demonstrated lack of uniformity in sentencing among the Circuits presents a paradigm case for review. *United States* v. *Booker*, 552 U.S. 220, 223 (2005).

Alternatively, the Government argues that the sentencing issue is "largely academic" due to Mr. Calabrese's age. But the issue is not academic to Mr. Calabrese, who may in fact live long enough to enjoy the fruit of a favorable ruling. Nor is the issue academic to criminal defendants or the public, both of whom have the right to lawful sentencing.

What the Government seeks to avoid in advancing these procedural dodges is the Court's examination of the relevant statutory language. That is because the Government can only prevail if this Court is willing to rewrite the critical language of 18 U.S.C. § 924(c) so that it reads instead like 18 U.S.C. § 1028A:

18 U.S.C. § 924(c)(1)(D)	18 U.S.C. § 1028A(b)
Notwithstanding any other provision of law . . . no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.	Notwithstanding any other provision of law . . . (2) . . . no term of imprisonment imposed on a person under this section shall run concurrently with any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used;

	(3) *In determining any term of imprisonment to be imposed for the [underlying] felony . . . a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section.*

Given the textual differences—one statute expressly forbids district courts from considering the effect of consecutive, mandatory minimum sentences when fashioning a predicate sentence while the other does not—the Government's position requires nothing less than a wholesale judicial amendment to Section 924(c). And the Seventh Circuit's willingness below to adopt the Government's position conflicts directly with this Court's requirement, articulated in *Kimbrough* v. *United States*, 552 U.S. 85 (2007), that a statute must use unequivocal language to bar a district court's consideration of a particular sentencing rationale. Grant of Mr. Calabrese's petition is therefore warranted.

ARGUMENT

I. Reviewing the circuit split on this important sentencing issue that recurringly creates disparate outcomes is not merely "academic."

The Government urges the Court to deny Mr. Calabrese's petition to review his robbery sentence, calling the question merely "academic" because of his long, mandatory gun sentence. Resp. Br. at 6. While the mandatory 57-year portion of the sentence will make Mr. Calabrese an elderly man when he is eligible for release, it is entirely possible that he will live to that date. And any amount of time added to those 57 years by the district court because the Seventh Circuit tied the judge's hands—and not because she thought that additional time was appropriate—makes it increasingly unlikely that Mr. Calabrese will outlive his sentence. The issue is hardly academic.

Equally important, the Government's argument ignores the national lack of sentencing uniformity and the resulting need for this Court's guidance on a repetitive sentencing issue where many of the petitioners, by definition, will be facing long mandatory minimums as a starting point. What would the Government consider not "academic"? Release at age 75? Age 85 or 90? No years in a prison sentence are "academic" to the person serving the time, and the Government's argument overlooks the fact that there is a difference between a life sentence and a sentence for a term of years.

What *is* "largely academic" is the Government's other primary focus: splitting hairs about prece-

dential versus non-precedential authority. Supreme Court Rule 10(a), cited by the Government, notes that the list of reasons it provides do not control or fully measure the Court's discretion, and this Court has previously granted certiorari to consider splits that arose from district-court decisions. *See, e.g.*, *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 257 n.14 (1981) (granting certiorari based on conflict among four federal district-court decisions where issue was "important and appears likely to recur"); *Massachusetts* v. *United States*, 435 U.S. 444, 453 (1978) (granting certiorari to resolve a conflict between a First Circuit opinion and a decision of the Northern District of Georgia); *Dawson Chem. Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 185 & n.4 (1980) (granting certiorari where "[t]here [was] no direct conflict, but a number of decisions exhibit some tension" on important questions, citing federal appellate and district-court decisions). There is no requirement that "sanction" of lower court opinions take the form of affirmance with specific comment by the appeals court. In fact, the disagreements among district judges who regularly make sentencing decisions demonstrates the existence of confusion on this important issue.

Moreover, the Government is simply wrong to argue that the opinions of the First and Sixth Circuits in *Vidal-Reyes* and *Guthrie* are not in conflict with the Seventh Circuit.[1] The Government

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[1] *Cf. United States* v. *Ressam*, 593 F.3d 1095, __ n.8 (9th Cir. Feb. 2, 2010) (discussing a split between the Sixth Circuit's *Franklin* and Seventh Circuit's *Roberson* decisions, and the First Circuit's *Vidal-Reyes* decision, on the impact of

[Footnote continued on next page]

attempts to distinguish the First Circuit decision, *Vidal-Reyes*, as turning on the fact that the acts resulting in the mandatory minimum were not a predicate act of the underlying offense. But this was not an important factual distinction to the First Circuit: "[W]e would read the § 924(c) line of cases to support, at most, the presence of an implied sentencing limitation in § 924(c) that mirrors the express sentencing limitation in the text of § 1028A(b)(3), which applies to predicate offenses only." *United States* v. *Vidal-Reyes*, 562 F.3d 43, 52 (1st Cir. 2009).

The Government's position also ignores the First Circuit's broad reasoning, which is in direct conflict and irreconcilable with that of the Seventh Circuit. *Id.* at 50–56. For example, the First Circuit noted that reading "§ 1028A(b)(2) as barring the consideration of the statute's mandatory sentence in imposing a sentence[e] on *all other counts* would essentially render § 1028A(b)(3) superfluous." *Id.* at 52. That same argument applies here. The Government and the Seventh Circuit's approach would require courts to treat these two statutes in exactly the same way, despite the fact that § 1028A contains express instructions that § 924(c)(1) does not, as noted in the comparison chart, above. And this express distinction also shows why the Government's argument about 18 U.S.C. § 3551(a) does not end the matter. Resp. Br. at 7. The Government claims that the "no term of imprisonment" language of § 924(c)(1)(D) is a specific

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[Footnote continued from previous page]
§ 924(c) mandatory minimums on calculation of Guidelines when applied to grouped sentences).

provision that means § 3553(a) does not apply, but § 1028A contains that same language, and yet Congress still thought it necessary to expressly preclude consideration of other sentences in § 1028A(b)(3).

Similarly, the Government cannot reconcile *Guthrie* with *Roberson*, since the Sixth Circuit has essentially allowed district courts to depart from the Guidelines as long as no inference is raised that they did so in consideration of the mandatory minimum sentence. *United States* v. *Guthrie*, 557 F.3d 243, 247, 255 (6th Cir. 2009). Mere speculation that "other factors," Resp. Br. at 11, could have accounted for the departure is neither plausible nor enough to distinguish the authority that the Sixth Circuit has now given its lower courts.

In the end, the Government's position is strikingly at odds with the text of the statutes the Court is asked to interpret, and it ignores the vastly different sentencing outcomes depending on the Circuit in which a criminal defendant is convicted. If Mr. Calabrese had been lucky enough to be charged in Utah or Pennsylvania, his sentence would have been fashioned by considering the mandatory minimum. Instead, he was charged in Illinois, where the Seventh Circuit has erroneously grafted § 1028A(b)(3)'s prohibitory language onto § 924(c). This Court should grant the petition and reverse for re-sentencing.

II. The cumulative error doctrine requires Mr. Calabrese to receive a new and fair trial.

The Government maintains that there was nothing amiss about the Seventh Circuit's cumulative error analysis because, if anything, "only one trial error [was] found." Resp. Br. at 13. But the Government's conception of the cumulative error doctrine is faulty.

It is undisputed that the Due Process Clause's guarantee of a fair criminal trial requires that the effect of cumulative errors be considered. But an effective test must extend past weighing only those events neatly categorized by the courts of appeal as potentially reversible "errors." The Government cites *United States* v. *Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990), for the proposition that the fairness of a trial is considered only when more than one "error" can be cumulated. But the *Rivera* court still considered the overall fairness of the trial at issue there despite its so-called "one-error" rule. It simply did so as part of its overall Due Process/fundamental fairness analysis: "Courts have also found fundamental unfairness when error is considered in conjunction with other prejudicial circumstances within the trial, even though such other circumstances may not individually rise to the level of error." *Rivera*, 900 F.2d at 1477 (quoting *Taylor* v. *Kentucky*, 436 U.S. 478, 487 & n.15, 98 S. Ct. 1930, 1936 & n.15 (1978)). *Accord, e.g., United States* v. *McLain*, 823 F.2d 1457, 1462–63 (11th Cir. 1987) , *overruled on other grounds, United States* v. *Watson*, 866 F.2d 381 (11th Cir. 1989); *United States* v. *Diharce-Estrada*, 526 F.2d 637, 642 (5th Cir. 1976) (ordering

new trial "[b]ased upon the combination of error and prejudicial circumstances recited").

Here, in Mr. Calabrese's trial, two major evidentiary claims were such "close calls" that the Seventh Circuit would have affirmed the opposite decisions from another judge. Under these circumstances, this Court should require a *Rivera* fundamental fairness review that includes a cumulative look at error as well as other prejudicial circumstances that do not individually arise to the level of error.

CONCLUSION

For the reasons above stated and those previously advanced, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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